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Shadow Lawyering: Nonlawyer Practice Within Law Firms

Paul R. Tremblay
Boston College Law School

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Shadow Lawyering: Nonlawyer Practice Within Law Firms

PAUL R. TREMBLAY*

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Lawyers commonly associate with nonlawyers to assist in their performance of lawyering tasks. A lawyer cannot know with confidence, though, whether the delegation of some tasks to a nonlawyer colleague might result in her assisting in the unauthorized practice of law, because the state of the law and the commentary about nonlawyer practice is so confused and incoherent. Some respected authority within the profession tells the lawyer that she may only delegate preparatory matters and must prohibit the nonlawyer from discussing legal matters with clients, or negotiating on behalf of clients. Other authority suggests that the lawyer may delegate a wide array of tasks as long as the lawyer supervises the work of the nonlawyer and accepts responsibility for it. A good-faith lawyer reviewing the available commentary would

* Clinical Professor of Law and Law Fund Research Scholar, Boston College Law School. Many kind colleagues have shared ideas with me on this project or commented on earlier drafts of this Article, although not all of them agree with my conclusions. I thank Alexis Anderson, Bob Buchanan, Kathleen Clark, Andy Cohen, Praveen Kosuri, Bob Kuehn, Chuck Mokriski, Russ Pearce, Brian Price, and John Whitlock, as well as the participants at the Eighth Annual Transactional Law Clinic Conference and Workshop held at The George Washington University Law School, for their insights. I also thank Kerianne Byrne, Allison Diop-Frimpong, Matthew Hoisington, Ethan Hougah, and Joshua Minty for helpful research assistance, and Dean John Garvey and the Boston College Law School Fund for generous financial assistance with this project.

find it difficult to achieve appropriate comfort with her delegation decisions. This uncertainty affects not only lawyers working with paralegals and law clerks, but firms hiring out of state lateral associates and partners, and law school clinical programs engaged in transactional work.

This Article articulates a framework for assessing delegation choices, a framework which seeks to be both coherent and sensible. The framework relies on insights about lawyering judgment and risk assessment, client informed consent, and unauthorized-practice-of-law prophylaxis. Any delegation of work by a lawyer to a nonlawyer involves an exercise of the lawyer's judgment about an appropriate balance of risk and efficiency, along with an eye toward the client's informed choice about how to achieve the goals of the representation most efficiently. The prevailing unauthorized-practice-of-law dogma prevents a client from seeking the most economical representation by only retaining a nonlawyer, but that dogma trusts lawyers to protect a client's interests. With those considerations in place, this Article shows that the profession cannot, and in fact does not, deny the lawyer any categorical options in making delegation choices, except for those involving court appearances. Aside from sending a nonlawyer to court or to court-connected proceedings, a lawyer may responsibly delegate any of her lawyering activities to a nonlawyer associate, subject to the prevailing conceptions of competent representation and to the lawyer's retaining ultimate responsibility for the resulting work product and performance.

Some commentary and some court opinions suggest a different answer to the questions addressed here, but those authorities do not withstand careful analysis. This Article shows that a more careful reading of the commentary and the court dicta supports the framework and the thesis offered here. Nonlawyers may not independently engage in activity that equates to the practice of law, if by "independently" we mean without supervision and oversight from a lawyer. That important and uncontroversial limitation, however, is the only categorical restriction on a lawyer's discretion. A supervised nonlawyer may play a much more active and important role in a lawyer's overall representation of her client than many have claimed. For the client, that is a very good result.

INTRODUCTION

This Article explores an aspect of contemporary legal practice that is the source of considerable confusion within the profession—the limits, if any, on the engagement in legal activity by nonlawyers employed by lawyers. Most of the rhetoric from commentators and bar associations warns lawyers that they categorically may not delegate certain activities to their nonlawyer colleagues, especially the communication of legal advice.¹ Other authoritative sources, however, declare that lawyers may lawfully exercise considerable discretion about how nonlawyers work, so long as the lawyer supervises the work.² The available substantive law on the topic is scarce and

1. See, e.g., MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. Guideline 3(C) (2004) (declaring that paralegals may not provide legal advice to clients); see also *infra* text accompanying notes 40–97, for a discussion of that restriction and other categorical limits.

2. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2009) ("[The rules do] not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to

not entirely coherent. This Article represents an effort to accomplish dual objectives—to understand the available substantive law and its lessons about delegation of work to nonlawyers, and to craft a coherent framework for addressing the topic to guide lawyers and law firms in their practices. To those ends, this Article proposes a workable and practical thesis about nonlawyer practice that is faithful to the spirit of the principles governing how lawyers work.

Nonlawyers, of course, may not practice law in any jurisdiction within the United States,³ subject to some limited exceptions not relevant here.⁴ Established common law and state statutes throughout the United States limit the practice of law to members of the bar within the jurisdiction where the legal activity takes place.⁵ While the

them, so long as the lawyer supervises the delegated work and retains responsibility for their work.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 (2002) (permitting lawyer discretion without categorical exclusions). For a discussion of the discretionary authorities, see *infra* text accompanying notes 40–61.

3. See MODEL RULES OF PROF’L CONDUCT R. 5.5(a) (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 (2002); DEBORAH L. RHODE, ACCESS TO JUSTICE 15 (2004); *Prohibitions on Practice of Nonlawyers*, Laws. Man. on Prof. Conduct (ABA/BNA) No. 210, at 21:8001 (Dec. 22, 1999) (“Every jurisdiction prohibits the unauthorized practice of law.”).

4. The exceptions include legal work on matters whose practice is preempted by federal law, such as patent and tax work, see 37 C.F.R. § 10.14 (2009); 31 C.F.R. § 10.3 (2009) (governing practice before the Internal Revenue Service); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 570–71 (2005) (discussing both contexts); appearances before certain administrative agencies, see Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2273 (1999) (“Many federal agencies, including the U.S. Department of Health and Human Services, the Immigration and Naturalization Service, the U.S. Department of Labor, and the Social Security Administration, permit nonlawyers to appear in cases before them.” (citations omitted)); Marlene M. Remmert, Note, *Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law?*, 15 VAL. U. L. REV. 567, 577 (1981); and certain other legislative allowances, see, e.g., Kathleen Eleanor Justice, Note, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 206–07 (1991). For an overview of the unauthorized-practice rules and exceptions, see generally 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 5.5:201 (3d ed. 2001 & Supp. 2009); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 15.1, at 824–49 (1986).

5. See, e.g., CAL. BUS. & PROF. CODE § 6125 (West 2003) (“No person shall practice law in California unless the person is an active member of the State Bar.”); LAS Collection Management v. Pagan, 858 N.E.2d 273, 276 (Mass. 2006) (“Plainly the commencement and prosecution for another of legal proceedings in court, and the advocacy for another of a cause before a court . . . are reserved exclusively for members of the bar.” (quoting Lowell Bar Ass’n v. Loeb, 52 N.E.2d 27, 32–33 (Mass. 1943))). For an overview of the policy and ethics debates about the unauthorized practice of law, see, for example, DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 800–10 (5th ed. 2009); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 567 (1994); Derek A. Denckla, Response, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2597 (1999); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) [hereinafter Rhode, *Policing the Professional Monopoly*]. For a historical perspective, see Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY’S L.J. 343 (2008).

“unauthorized-practice-of-law” dogma⁶ has many persuasive critics,⁷ its central premise is an essential conceit within the legal profession in this country—that only lawyers, defined as individuals licensed to practice in the jurisdiction, may provide legal services to clients. That otherwise stringent and unyielding dogma, though, has historically allowed nonlawyers to *assist* lawyers in their provision of legal services, so long as a lawyer supervises that assistance.⁸ The question we explore here is whether there are forms of assistance that the lawyer may not delegate to a nonlawyer—that is, whether there are tasks that the nonlawyer may not perform even under a lawyer’s supervision. This examination accepts, in a pragmatic way for the purposes of this Article, the inevitability and the persistence of the unauthorized-practice-of-law dogma.⁹

The intriguing questions about the scope of activity permitted to nonlawyers in law firms arise in several practice contexts.¹⁰ The inquiry obviously matters to the typical

6. In this Article I refer to the collection of unauthorized-practice-of-law mandates as a “dogma.” My choice of term represents my effort to capture the inflexibility and, at times, unprincipled stubbornness of the arguments underlying the restrictions on nonlawyer practice. See Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 703, 711–12 (1996) [hereinafter Rhode, *Professionalism*] (explaining that the unauthorized-practice rules promote a monopoly of legal practice for licensed attorneys, which reduces availability of affordable legal services).

7. See, e.g., RHODE, *supra* note 3, at 88–89 (noting that the Justice Department, the Federal Trade Commission, and the ABA’s antitrust division have opposed the ABA’s proposal to strengthen enforcement efforts against nonlawyers who practice law); Peter S. Margulies, *Protecting the Public Without Protectionism: Access, Competence and Pro Hac Vice Admission to the Practice of Law*, 7 ROGER WILLIAMS U. L. REV. 285, 285 (2002) (noting that unauthorized-practice-of-law restrictions “impair client access to attorneys of their choice”).

8. See *In re* Opinion No. 24 of Comm. on Unauthorized Practice of Law, 607 A.2d 962, 967 (N.J. 1992) (acknowledging the importance of nonlawyer assistance to lawyers); MODEL RULES OF PROF’L CONDUCT R. 5.3 (2004).

9. In other words, this Article is not an inquiry into whether nonlawyers should be permitted greater opportunities to practice law independently. That topic is well rehearsed elsewhere. See, e.g., RHODE, *supra* note 3, at 79–96; George C. Leef, *The Case for a Free Market in Legal Services*, 322 POL’Y ANALYSIS 1 (1998); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235 (2002). The goal of this Article is to test the limits of nonlawyer practice in light of, and respecting, existing unauthorized-practice restrictions.

10. One context that this Article will not address, despite its apparent connection to this project, is the status of suspended or disbarred lawyers working as clerks, paralegals, or assistants within law firms. While one might expect that the analyses and critiques developed in this Article would apply naturally to those persons, in fact the jurisprudence sometimes treats those individuals more strictly than other nonlawyers. See, e.g., *Crawford v. State Bar*, 355 P.2d 490 (Cal. 1960); *In re Discipio*, 645 N.E.2d 906, 911 (Ill. 1994) (“Without a doubt, a disbarred or suspended attorney should not serve as a law clerk or a paralegal during his disbarment or suspension.”). But see, e.g., *Fla. Bar v. Thomson*, 310 So. 2d 300, 301 (Fla. 1975) (holding that a disbarred attorney may be employed in a nonlawyer capacity under the supervision of a lawyer in good standing). For an example of a state professional conduct rule limiting the rights of disbarred or suspended lawyers, see N.M. R. ANN. R. 16-505 (West 2007). See also *NFPA Takes Stand on Disbarred, Suspended Attorneys*, No. 5 LEGAL MGMT. (NFPA), Sept.–Oct. 2001, at 16 (reporting a National Federation of Paralegal Associations (NFPA) resolution

law firm, whether a solo practice or a major international organization, where paralegals regularly assist in preparation for every imaginable type of legal work—complex commercial transactions, real estate closings, divorce settlements, pretrial litigation and trial preparation, and the like. Lawyers in those settings should understand the kinds of limits that exist on their use of nonlawyer assistants in their practices.¹¹

The question also arises in a more defined and perhaps interesting way in the setting of a large, national law firm that hires lateral partners and associates from law firms in other states.¹² In lateral hiring settings, the new lawyer, who may be exquisitely experienced and valuable as a member of the new firm (and who will likely be offered a handsome salary to join the new firm), remains a nonlawyer until she passes the new state's bar examination or otherwise gains admission into that state's bar.¹³ The new law firm must understand the limits of the lateral's authority to offer her valuable and highly compensated services to the firm's clients. If the law firm guesses wrong about the contours of the lateral's role, it risks serious consequences.¹⁴ For a lateral who is a litigator, avenues exist through which to obtain formal permission to practice law in the

asserting that "it is unethical for attorneys whose licenses have been revoked or who are under suspension to gain employment and perform legal tasks handled by paralegals").

11. As the discussion below will highlight, trade associations have developed some standards to which lawyers and paralegals may look for guidance. This Article critiques those standards in its effort to reconcile some of the inconsistent messages arising from the guides. The most prominent guides include those of the ABA and the National Association of Legal Assistants (NALA). See MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVICES (2004); NAT'L ASS'N OF LEGAL ASSISTANTS, NALA CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY, available at <http://www.nala.org/code.aspx> [hereinafter NALA CODE OF ETHICS]; NAT'L ASS'N OF LEGAL ASSISTANTS, NALA MANUAL FOR PARALEGALS AND LEGAL ASSISTANTS § 3.061 (5th ed. 2009).

12. Lateral movement among lawyers is a growing phenomenon. See Aric Press, *In-House*, AM. LAW., Feb., 2009, at 11 ("A record number of Am Law 100 and 200 partners changed firms last year . . . [according to] our annual report."). For a discussion of the migrating-lawyer phenomenon and the conflict-of-interest implications of that reality, see Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checking*, 19 GEO. J. LEGAL ETHICS 489 (2006).

13. See NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION ON LEGAL EDUC. & ADMISSION TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 28–29 (2009). A lawyer may not simply join a new state's bar at will upon changing residence. See *id.* (explaining that 24 jurisdictions allowed lawyers admitted in another state to practice in the courts of their state; each requires the state from which the attorney is licensed to allow similar reciprocity to attorneys from their state); Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 137–38 (2004) (critiquing those restrictions).

14. See, e.g., *Birbrower v. Superior Court*, 949 P.2d 1, 1–6 (Cal. 1998) (discussing a firm that violated a state unauthorized-practice-of-law statute while serving a California client by using attorneys in negotiation settlements and preliminary arbitration arrangements who were not licensed to practice in California). For a review of *Birbrower*, its implications, and the ABA response to the case, see generally, William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW 1501 (2001); Cynthia L. Fountaine, *Have License, Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules*, 81 WASH. U. L.Q. 737, 740–41 (2003); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 81 MINN. L. REV. 73, 82–83 (1997).

new state on discrete matters.¹⁵ If the new lateral is a transactional lawyer, however, the uncertainties addressed here are palpable and trigger serious professional responsibility questions.

The recognition that this question has more importance within corporate and transactional practice than in litigation practice suggests yet another setting where the resolution of the questions addressed here has great importance. In recent years, law schools have begun to offer clinical courses in which law students, for credit, engage in the representation of small businesses and nonprofit corporations under the supervision of a faculty member.¹⁶ In these clinics, students are expected to assume the role of a practicing lawyer with much, and sometimes almost complete, responsibility for the client's representation. That role assumption, indeed, is central to the clinical pedagogical model.¹⁷ In traditional litigation clinics, students may assume that lawyer role without running afoul of unauthorized-practice principles by virtue of a student-practice rule in effect in the state where the law school sits.¹⁸ But the student-practice rules of nearly all states are silent about students' practice in transactional settings.¹⁹ Without a student-practice rule in place, students who wish to represent clients in a transactional clinic are effectively nonlawyers. Faculty and students in such clinics therefore must understand confidently the limits of that nonlawyer role.²⁰

15. Lawyers may appear in court with permission of a judge under a procedure known as "pro hac vice." For a discussion of the pro hac vice accommodation, see *infra* note 26.

16. For a description of the emerging clinical movement in transactional and community development work, see Alicia Alvarez, *Community Development Clinics: What Does Poverty Have to Do with Them?*, 34 FORDHAM URB. L.J. 1269 (2007); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249 (2004); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195 (1997) [hereinafter Jones, *Transactional Lawyering for Social Change*]; Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000); Peter Pitegoff, *Law School Initiatives in Housing and Community Development*, 4 B.U. PUB. INT. L.J. 275 (1995).

17. See, e.g., Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 169 (2001); Jennifer A. Gundlach, *"This Is a Courtroom, Not a Classroom": So What Is the Role of the Clinical Supervisor?*, 13 CLINICAL L. REV. 279 (2006); Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815 (2004); James E. Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 FORDHAM L. REV. 2377 (1999).

18. Every state has a student-practice rule outlining the requirements under which students may perform lawyering tasks. See David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1546-54 (1998) (cataloguing student practice rules from all states); cf. *infra* note 36 and accompanying text.

19. As discussed below, student-practice rules are nearly uniform in addressing only in-court representation and other litigation contexts; they are mostly silent on the possibilities of students performing work outside of the litigation setting. See Sara B. Lewis, Comment, *Rite of Professional Passage: A Case for the Liberalization of Student Practice Rules*, 82 MARQ. L. REV. 205, 207-09 (1998) (addressing inadequacies in current student-practice rules and proposing a better mode of regulation for students in clinical settings); see also *infra* text accompanying notes 36, 199.

20. Another increasingly important context in which these questions have direct relevance is that involving the use of foreign lawyers as adjuncts to United States law firm practice. For a

This Article will refer to all of those actors as nonlawyers, rather than referring to them in the more narrow conception of paralegals.²¹ While all paralegals are nonlawyers, many nonlawyers, like lateral soon-to-be partners²² and associates or law students engaged in transactional work in a clinic, differ in important ways from the usual understanding of paralegals. I use a broader term for a substantive reason as well. The thesis developed here is a unified one, applicable to all nonlawyers regardless of their status within a law firm, while by its terms accounting for the difference in skill and experience of the nonlawyers to whom a lawyer has delegated some legal responsibility.

The thesis that this Article will defend emerges from an appreciation of three features central to effective practice as understood by the prevailing law and ethics of lawyering. First, it recognizes the importance of the lawyer's professional practical judgment and risk assessment in accomplishing legal work for a client.²³ Second, the thesis acknowledges the relationship between the lawyer's pragmatic judgments and the client's informed consent.²⁴ And finally, it builds upon the reality of, and the rationales underlying, the unauthorized-practice-of-law prophylaxis.²⁵

Those features understood in concert permit the following thesis to emerge: A lawyer may delegate to a nonlawyer working in her law firm any lawyering task, except for appearances before tribunals such as courts (or activities ancillary to such appearances, such as depositions), so long as the lawyer adequately supervises the nonlawyer and accepts full professional responsibility for the resulting work. The lawyer's delegation decisions remain subject to the competence and malpractice standards generally applicable to lawyering, as well as to the informed buy-in of the lawyer's client.

This thesis does not accommodate categorical, preemptive rules limiting a lawyer's delegation choices, except in two ways. It accepts the pragmatic categorical limitations on nonlawyer involvement in the work of tribunals, acknowledging the practical operation of courts and judges.²⁶ It also recognizes the historical restrictions involving

discussion of that phenomenon, see Richard Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 750–62 (1994); Michele Gilligan, *Another Effect of Globalization: Role of Foreign Educated Lawyers in Maryland Legal Practice*, 37 U. BALT. L.F. 1, 12 (2006); Darya V. Pollak, "I'm Calling My Lawyer . . . in India!": *Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99 (2006); Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039 (2002).

21. The Model Rules use the term "nonlawyer." MODEL RULES OF PROF'L CONDUCT R. 5.3 (2009). The ABA standards use the term "paralegals." MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. (2004).

22. Nonlawyers may not be equity partners in law firms in most jurisdictions. See MODEL RULES OF PROF'L CONDUCT R. 5.4(b) (2004). But see N. Y. JUDICIARY LAW DR 2-102(D) (2003) (explaining that out-of-state lawyers may be partners in New York law firms under certain circumstances).

23. See *infra* Part III.B.1.

24. See *infra* Part III.B.2.

25. See *infra* Part III.B.3.

26. Out-of-state lawyers typically may appear in courts with the permission of the presiding judge under a scheme known as "pro hac vice." See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2002) (describing the practice); see also Margulies, *supra* note 7, at 303–07 (describing the pro hac vice process); cf. *Leis v. Flynt*, 439 U.S. 438 (1979)

the management and ownership of law firms.²⁷ The thesis is fully consistent with a nuanced appreciation of the available substantive law, although it is arguably inconsistent in some important ways with much advisory pronouncement on the topic. As will be discussed,²⁸ one significant categorical topic muddies the thesis—the oft-repeated advisory prohibition against nonlawyers giving legal advice to a client.²⁹ That prohibition, upon reflection and careful review of the available substantive law, is neither sustainable nor coherent. While nonlawyers cannot, in light of the unauthorized-practice dogma, offer independent advice or counsel to a client, they may properly communicate supervised legal advice in collaboration with the lawyer responsible for the matter.³⁰

This Article will explore these issues in the following way. It begins in Part I with a story, populated by a lawyer practicing in a law firm with several nonlawyers available to assist him. My intention is to use the story to highlight the various ways in which nonlawyers of differing experience and training might assist in contributing to the resolution of a client's legal matter. Part II summarizes the substantive law and advisory authority available to an observer looking for guidance on the questions posed here. Part II concludes that binding common law, rules, or statutes do not support the advisory authority's insistence that certain categorical activity is off limits for nonlawyers.

Part III develops the thesis just articulated. It describes the three features central to a thoughtful assessment of nonlawyer participation—lawyering judgment, client autonomy, and unauthorized-practice rationales. It then unpacks the justifications for the profession's acceptance of nonlawyer assistance in the “easy” instances (drafting documents, performing legal research, and investigating facts), and proceeds to show

(explaining that there is no constitutional right to gain pro hac vice admission). The court-appearance exception is not a principled one but instead a pragmatic one, recognizing the reality of American litigation practice. It is also noncontroversial, both because of its public character (a judge has control over his or her court and can decide definitively who may say what words or take what actions in the courtroom) and because in that sphere lawyers do not struggle with the uncertainties that they encounter in their out-of-court or in-office practices. See Steven Stewart Madsen, Comment, *Leis v. Flynt: Retaining a Nonresident Attorney for Litigation*, 79 COLUM. L. REV. 572, 584–87 (1979).

27. The legal profession closely protects its exclusive ownership and management of law practice. See MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2004) (lawyers may not share fees with nonlawyers); *id.* at 5.4(b) (no partnership with nonlawyers); *id.* at 5.4(d) (no nonlawyer ownership in law firms); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 10 (2002). For a sampling of the critique of that protectionist stance (which this Article will not challenge for its purposes), see Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217 (2000); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008); Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625 (2000).

28. See *infra* text accompanying notes 50–57.

29. See, e.g., VA. ALLIANCE OF PARALEGAL ASS'NS (VAPA), EDUCATIONAL STANDARDS AND PROFESSIONAL RESPONSIBILITY GUIDELINES FOR PARALEGALS IN THE COMMONWEALTH OF VIRGINIA Guideline 1 cmt. (1995), <http://www.vaparalegalalliance.org/educational.html> [hereinafter VAPA GUIDELINES] (“A paralegal shall not give legal advice or opinions . . .”).

30. See *infra* text accompanying notes 147–48.

how those justifications presume a lawyer's exercise of judgment about risk and benefit in her fiduciary role on her client's behalf. Once unpacked, the risk assessment and lawyering judgment factors operate to support the thesis that there are, or ought to be, no categorical exceptions to a lawyer's delegation discretion. Part IV then returns to the law firm story, to show how the thesis might operate in context.

I. A LAW FIRM STORY

Any analysis of the limits of nonlawyer practice within a law firm would benefit from some concrete context. Let us, then, imagine the following story:³¹

Essex Legal Services Institute (ELSI) is a state- and foundation-funded legal aid organization offering free legal services to low- and moderate-income persons within Essex County, Massachusetts.³² ELSI has traditionally offered individual litigation services—family law, housing and eviction defense, Social Security disability appeals, and the like—to its individual clients, in addition to performing impact litigation on behalf of groups of poor clients.³³ ELSI recently hired Dara Coletta, a community economic development lawyer with four years experience in California, to join its program to establish a new community economic development (CED) project, which will offer representation of nonprofits and community-based organizations in an effort to contribute to the asset building of its constituents.³⁴ Coletta has applied to take the

31. The story chosen here emerges from public interest practice, even though an equally useful story would use a private law firm setting. I have chosen a legal services organization, though, for a very direct purpose. As the story indicates, it permits the comparison of an experienced lateral lawyer, a certified law student, a noncertified law student, and a novice paralegal intern, to test whether the qualifications and experience of the legal assistant/nonlawyer make a difference in the analysis. Since private law firms typically cannot use certified law students (as most student-practice rules limit student representation to clinical or nonprofit settings), the public interest setting offers a better opportunity for comparison. Of course, the assessments of the limits on the unauthorized-practice dogma arising in this setting should be fully transferable to the private firm setting.

32. ELSI is entirely fictional, although Essex County, Massachusetts is not. ELSI has appeared before. Paul R. Tremblay, *Acting "a Very Moral Type of God": Triage Among Poor Clients*, 67 *FORDHAM L. REV.* 2475, 2483 (1999).

33. Neighborhood legal services offices have traditionally focused on crisis-driven, litigation-centric services for the poor clients in their communities. For an assessment of the role tensions of such offices, see Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 *N.C. L. REV.* 281 (1982); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 *GEO. L.J.* 1529, 1536–39 (1995); Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 *MICH. J. GENDER & L.* 493, 497, 502 (1996).

34. Poverty lawyers have an increasing interest in community economic development, rather than the traditional litigation services, as an essential part of community empowerment. See WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS AND THE NEW SOCIAL POLICY* (2001); Scott L. Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 *STAN. L. REV.* 399 (2001); Scott L. Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-Income Workers*, 25 *N.Y.U. REV. L. & SOC. CHANGE* 181 (1999); Jones, *Transactional Lawyering for Social Change*, *supra* note 16; Marshall, *supra* note 16.

Massachusetts Bar Exam, and with luck she will be a Massachusetts lawyer within nine months. Her supervisor at ELSI is Joe Bartholomew, a twenty-two-year veteran of Massachusetts legal services practice, but a relative newcomer to the transactional issues that the new CED project will encounter.

One of the CED project's first new clients is the Montrose Community Development Corporation (MCDC), which is in the midst of developing thirty-three units of below-market condominium housing for sale to low- and moderate-income, first-time home buyers. Coletta agreed with MCDC for ELSI to serve as its counsel in the final development stages, and then in the sale transactions, from the purchase and sale agreements through the final closings to qualified families. Because the condominium development includes deed restrictions (to maintain the affordability of the units over time), the MCDC documents will include special master covenants and other sophisticated tools to achieve the project's mission.³⁵

ELSI assigned three part-time staff members to work with Bartholomew and Coletta on the MCDC project:

- David Dahlstrom is a third-year law student who had been working in ELSI's Housing Unit, defending evictions in court. Dahlstrom has obtained the status of "certified law student" under the Massachusetts Student Practice Rule.³⁶
- Julie Lucia is a second-year law student who had been working in ELSI's Welfare Unit, preparing and attending welfare hearings. Lucia is not a certified law student under the state student-practice rule, because the rule does not cover her work in this public-interest setting,³⁷ and because she need not be certified as a student lawyer to engage in welfare hearing representation.³⁸
- Mike Newman is a volunteer intern at ELSI. He is a nineteen-year-old sophomore at Tufts University, and he has been assisting ELSI this year with clerical and administrative help.

Coletta, with Bartholomew as her supervisor, intends to use her team to perform all of the legal work for the MCDC transactions, including drafting all of the real estate documents; researching the applicable law governing deed restrictions and zoning requirements; counseling MCDC about its legal options regarding the deed restrictions and covenants to be included in the condominium documents, as well as the terms of

35. For a discussion of this kind of housing program, see CHARLES E. DAYE, OTTO J. HERTZEL, JAMES A. KUSHNER, HENRY W. MCGEE, JR., ROBERT W. WASHBURN, PETER W. SALSICH, JR., W. DENNIS KEATING & DANIEL R. MANDELKER, HOUSING AND COMMUNITY DEVELOPMENT: CASES AND MATERIALS 240-43 (3d ed. 1999); Rochelle E. Lento, *Federal Sources of Financing*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 215, 235-39 (Tim Iglesias & Rochelle E. Lento eds., 2006). See also 42 U.S.C. § 12771(a) (1992) (requiring fifteen percent of HOME funds to be distributed to nonprofits like MCDC).

36. See MASS. R. SUP. JUD. CT. 3:03. Under the Massachusetts student-practice rule, David may appear as a lawyer in the district courts of Massachusetts, so he may try cases in those courts, just as a fully licensed lawyer may do.

37. See *id.* at 3:03(8) (explaining that a second-year student may only be certified in Massachusetts if she is enrolled in a law school clinical program).

38. See generally Remmert, *supra* note 4, at 577.

the sales; negotiating discrete terms with the buyers or the buyers' lawyers; and representing MCDC at each of the closings.

This story presents five individuals working within a proper law firm³⁹ engaged in the representation of a client on a legal matter. This story also describes five persons, only two of whom are deemed lawyers licensed to practice law in Massachusetts (Joe Bartholomew and David Dahlstrom). The question is what activities any of these five persons may engage in to represent MCDC. To answer that question, we must canvass the substantive law governing nonlawyer practice within a law firm, as well as the advisory authority on that topic. Because it tends to be clearer (if at times inconsistent), we will start with the advisory authority and then connect those teachings to the binding law on the topic.

II. ADVISORY GUIDANCE AND SUBSTANTIVE LAW REGULATING NONLAWYER PRACTICE

A. Advisory Rhetoric

Only licensed lawyers may represent clients, of course, but all authorities agree that lawyers may delegate tasks to nonlawyers to assist them in that representation. The *Restatement (Third) of the Law Governing Lawyers* ("*Restatement*")⁴⁰ describes the scope of a nonlawyer's role as follows:

For obvious reasons of convenience and better service to clients, lawyers and law firms are empowered to retain nonlawyer personnel to assist firm lawyers in providing legal services to clients. In the course of that work, a nonlawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice. Those activities are permissible and do not constitute unauthorized practice, so long as the responsible lawyer or law firm provides appropriate supervision (see § 11, Comment *e*), and so long as the nonlawyer is not permitted to own an interest in the law firm, split fees, or exercise management powers with respect to a law-practice aspect of the firm (see § 10).⁴¹

39. A legal services organization is a law firm entitled to practice law, in precisely the same fashion as any private law firm partnership, professional corporation (PC), or limited liability partnership (LLP). See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.0(c) (2009); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123(2) (2002) (providing that lawyers in a legal services organization are treated as members of a law firm).

40. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2002).

41. *Id.* § 4 cmt. g. The *Restatement's* citation of section 11, comment *e* is perplexing and possibly reflects a clerical error in the *Restatement* text. Section 11, comment *f* addresses the lawyer's supervisory responsibility for nonlawyers, while comment *e* addresses supervising subordinate lawyers. Perhaps, then, the drafters intended to refer to comment *f* instead of *e*. On the other hand, because comment *f* states that "[d]uties corresponding to those of a lawyer with respect to other firm lawyers exist with respect to supervising nonlawyers in a law firm," *id.* § 11 cmt. f, the drafters may have intended to refer the reader to comment *e* for guidance about supervision obligations generally.

Aside from its recognition that lawyers may not assign management, equity, and ownership interests to nonlawyers,⁴² the *Restatement's* proposition does not suggest any categorical exclusions from its basic lesson that, with "appropriate supervision," lawyers may assign any of their work to nonlawyers, including the provision of legal advice.⁴³ The *Restatement* warns lawyers to establish supervision protocols to "assure that any advice given [by the nonlawyer] is appropriate."⁴⁴

The *Restatement* position is entirely sensible,⁴⁵ and it supports the thesis developed in this Article. But the *Restatement* does not acknowledge, either in its comments or its Reporter's Notes, a widespread and long-standing contrary assertion—that a lawyer may not delegate certain legal tasks to a nonlawyer, even if the lawyer supervises the nonlawyer and retains full responsibility for the resulting client representation work. An American Bar Association (ABA) formal ethics opinion introduced the concept of certain categorical exclusions with the following advice to the bar in 1968: "[W]e do not limit the kind of assistants the lawyer can acquire in any way to persons who are admitted to the Bar, so long as the nonlawyers do not do things that lawyers may not do or do the things that lawyers only may do."⁴⁶ The emphasized language suggests that some lawyering tasks are beyond delegation, and the Committee's opinion makes clear that it refers not to the management, equity interest, or ownership considerations that the *Restatement* carved out.⁴⁷ The opinion identifies two categorical limitations on lawyer delegation to nonlawyers: "counsel[ing] clients about law matters"⁴⁸ and "appear[ing] in court or . . . in formal proceedings that are a part of the judicial process."⁴⁹

The restrictions suggested by the ABA in 1968 have appeared frequently, and continue to appear, in advisory authorities. The South Carolina Supreme Court has suggested, in dictum, a similar limitation on the scope of the nonlawyer's role:

The activities of a paralegal do not constitute the practice of law as long as they are *limited to work of a preparatory nature*, such as legal research, investigation, or the composition of legal documents, which enable the licensed attorney-employer to carry a given matter to a conclusion through his own examination, approval or additional effort.⁵⁰

42. *Id.* § 10 cmt. c. The exceptions to that conclusion identified within the *Restatement* are not categorical ones excluding certain lawyering activities, but only address ownership and management functions within the law firm, restrictions that are not at all controversial. *See supra* note 27 (describing the restrictions on lay participation in law firms, and noting critiques of the restrictions).

43. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. g (2002).

44. *Id.* § 11 cmt. f.

45. *See infra* text accompanying notes 160–72.

46. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 316 (1967) (emphasis added) [hereinafter ABA Formal Op. 316].

47. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. g (2002).

48. ABA Formal Op. 316, *supra* note 46.

49. *Id.* The opinion does identify a third categorical exclusion, "engag[ing] directly in the practice of law," *id.*, but that limitation contributes nothing useful to the inquiry. It begs the question it purports to answer.

50. *In re Easler*, 272 S.E.2d 32, 32–33 (S.C. 1980) (emphasis added) (dictum) (footnote

The Supreme Court of South Carolina later amplified its statement in *Easler* by asserting that a nonlawyer's "answering legal questions would constitute the unauthorized practice of law."⁵¹

In 2001, the assistant professionalism counsel of the ABA Center for Professional Responsibility described the ABA's limitations on what lawyers should not delegate to nonlawyers as follows: "The ABA Model Guidelines for the Utilization of Legal Assistant Services delineate three responsibilities a lawyer may not delegate to a legal assistant: establishing an attorney-client relationship, setting the fee to be charged for a legal service, and *rendering a legal opinion to a client*."⁵² Similarly, the *Code of Ethics and Professional Responsibility* of the National Association of Legal Assistants (NALA) advises its members that they may not "give legal opinions or advice."⁵³ Several state bar ethics opinions and guidelines for paralegal practice echo the same categorical exclusion for offering legal advice⁵⁴ and, sometimes, for negotiating on behalf of a client.⁵⁵ However, the most recent iteration of the ABA Model Paralegal Guidelines suggests a more thoughtful approach. While the Guidelines categorically exclude delegating "responsibility for a legal opinion rendered to a client,"⁵⁶ they qualify that ban with a recognition that nonlawyers may "be authorized to communicate a lawyer's legal advice to a client so long as they do not interpret or expand on that advice."⁵⁷

omitted). The South Carolina Supreme Court later, in more dicta, expanded on the *Easler* precedent to claim that nonlawyers may not provide legal advice. *See Doe v. Condon*, 532 S.E.2d 879 (S.C. 2000).

51. *Condon*, 532 S.E.2d at 883 (dictum).

52. Kathleen Maher, *No Substitutions: Legal Aides Are Crucial, but Some Tasks Lawyers Should Not Delegate*, 87 A.B.A. J. 66 (2001) (emphasis added). Maher was describing the ABA's *Model Guidelines for Legal Assistants* as they existed in 2001. The 2004 Model Paralegal Guidelines offer a more nuanced approach, implying that nonlawyers may delegate counseling tasks if properly supervised. *See* MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. Guideline 1 (2004); *see also infra* text accompanying notes 147–48.

53. NALA CODE OF ETHICS, *supra* note 11, at Canon 3. The NALA Canon also includes the restriction against "represent[ing] a client before a court or agency unless so authorized by that court or agency." *Id.*

54. *See, e.g.*, N.H. SUP. CT. R. 35; Fla. Bar, Ethics Opinion 89-5 (1989), <http://www.floridabar.org/tfb/TFBETOpin.nsf/EthicsIndex?OpenForm> (search "Ethics Opinion Search" for "89-5"; then follow "Ethics, Opinion 89-5" hyperlink) (allowing nonlawyers to handle real estate closings so long as, among other things, the nonlawyer does not furnish legal advice); State Bar of Ga., Advisory Opinion 21 (1977), http://www.gabar.org/handbook/state_disciplinary_board_opinions/adv_op_21/ (prohibiting "[a]ny contact with clients or opposite counsel requiring the rendering of legal advice of any type"); STATE BAR OF MICH., ROLE OF NONLAWYERS IN LAW PRACTICE: GUIDELINES FOR UTILIZATION OF LEGAL ASSISTANT SERVICES Guideline 2 cmt. b, <http://www.michbar.org/opinions/ethics/utilization.cfm> (explaining that a nonlawyer may not "convey to persons outside the law firm the legal assistant's opinion" about legal matters); VAPA GUIDELINES, *supra* note 29 (providing that a "paralegal shall not give legal advice or opinions").

55. For sources addressing negotiation limits, *see infra* note 165.

56. MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. Guideline 3 cmt. (2004).

57. *Id.* at Guideline 6 cmt.

Of course, none of the sources just quoted or cited represents binding legal authority for any practicing lawyer.⁵⁸ State ethics opinions are advisory and do not carry enforcement authority.⁵⁹ The *Restatement* also does not represent binding substantive law,⁶⁰ although it enjoys considerable respect within American jurisprudence.⁶¹

B. Authority from State Rules or Statutes

The *Model Rules of Professional Conduct*, while themselves simply advisory and not binding on any lawyers, serve as the basis for most states' substantive rules governing lawyer conduct.⁶² The comment to Rule 5.5 offers some general, although vague, support for a more expansive view of the lawyer's discretionary delegation authority. Comment 2 declares that Rule 5.5's ban on the unauthorized practice of law "does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."⁶³ The comment does not say *any* or *all* functions, but neither does it offer any limitation on a lawyer's delegation of supervised activity.⁶⁴

Apart from that authority within Rule 5.5, a handful of states provide for more discrete guidance to lawyers using nonlawyer assistants, as well as to the nonlawyers

58. The language quoted above from the opinion of the South Carolina Supreme Court, *supra* text accompanying note 50, was dictum in the case before the court. See *In re Easler*, 272 S.E.2d 32, 32–33 (S.C. 1980).

59. See Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 382 (2002) (arguing that the varying levels of authority of ethics opinions in jurisdictions lead to their uncertain authority as a source of advice for lawyers).

60. See Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641 (1998) (explaining that the *Restatement* provisions are influenced by ALI members' interests); Harold G. Maier, *The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference Is Due to the Restaters or "Who Are These Guys, Anyway?"*, 75 IND. L.J. 541, 548 (2000) (arguing that no restatement has any independent legal force, and can never be more than a guide); Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?*, 46 OKLA. L. REV. 25, 30 (1993) (arguing that professional ethics law is far from uniform; any attempt to "restate" it must make policy choices and must pass judgment on the Model Rules); Fred C. Zacharias, *Fact and Fiction in the Restatement of Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903, 926 (1993) (explaining that individual states have made a conscious choice to address idiosyncratic jurisprudential differences, thus making any attempt to restate the law governing lawyers ineffective).

61. See generally Lawrence J. Latt, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697 (1998) (reviewing the deliberation and debate involved with the creation of the *Restatement*); Judith A. McMorro, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 36 (2005) (noting that the *Restatement* took fifteen years to complete).

62. See JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: STANDARDS, RULES AND STATUTES 210 (2009) (noting that forty-seven states have crafted their attorney conduct provisions after the Model Rules).

63. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2009).

64. See *id.*

themselves, regarding the scope of activity permitted to be delegated. In California, the only state in the country which licenses and regulates the practice of paralegals,⁶⁵ the licensing statute states that a “paralegal shall not . . . [p]rovide legal advice.”⁶⁶ Neither the statute itself nor any available interpretation of it tells us whether that ban applies only to *independent* legal advice, or whether its intention is to prohibit any communication of legal advice, even advice originating from the supervising lawyer.⁶⁷

The Rules of the Supreme Court of the State of New Hampshire offer “Guidelines for the Utilization by Lawyers of the Services of Legal Assistants,” and those rules include a comment that refers to a lawyer’s obligation to ensure that a legal assistant “does not provide legal advice.”⁶⁸ That prohibition, labeled as a comment but likely qualifying as binding substantive law in New Hampshire, indicates by its surrounding language that its intent is to prohibit only unsupervised legal advice by a nonlawyer.⁶⁹ The Rules Governing Paralegal Services of the State Bar of New Mexico state that “[a] paralegal shall not . . . provide legal advice.”⁷⁰ Like the New Hampshire limitation, that prohibition, which appears to have the force of law in New Mexico,⁷¹ seems only to apply to unsupervised, independent legal advice.⁷²

65. Susan Mae McCabe, *A Brief History of the Paralegal Profession*, MICH. B. J., Jul. 2007, at 18, 19.

66. CAL. BUS. & PROF. CODE § 6450(b) (“Notwithstanding subdivision (a), a paralegal shall not do the following: (1) Provide legal advice. . . .”). Subsection (a) states that “[t]asks performed by a paralegal include, but are not limited to” a list of identified tasks, including “case planning, development, and management; legal research; interviewing clients; fact gathering and retrieving information; drafting and analyzing legal documents.” *Id.* § 6450(a). Subsection (a)’s “including but not limited to” language implies that a lawyer may decide in her judgment how to employ a legal assistant, but subsection (b) limits the lawyer’s discretion and prohibits delegation of the task of providing client advice.

67. No court or agency has interpreted this language from the statute. For a discussion of New Hampshire’s statutory treatment of the legal advice question, see *infra* notes 68–69 and accompanying text (explaining that its ban most reasonably applies only to independent or unsupervised legal opinions).

68. N.H. SUP. CT. R. 35 cmt.

69. See *id.* Administrative Rule 35 integrates Rule 5.3 of the New Hampshire Rules of Professional Conduct, which mimics Model Rule 5.3. Compare MODEL RULES OF PROF’L CONDUCT R. 5.3 (2009), with N.H. SUP. CT. R. 35 cmt. c. (“It is the responsibility of the lawyer to take all steps reasonably necessary to ensure that a legal assistant for whose work the lawyer is responsible does not provide legal advice or otherwise engage in the unauthorized practice of law; provided, however, that with adequate lawyer supervision the legal assistant may provide information concerning legal matters and otherwise act as permitted under these rules.”) The word “otherwise” in the phrase “does not provide legal advice or otherwise engage in the unauthorized practice of law” implies that this rule is aimed at preventing nonlawyers from providing their own, unsupervised advice, and therefore engaging in the practice of law. The final clause, explicitly allowing nonlawyers to communicate legal information (which one infers can include “advice”) to a client, supports strongly the reading that a nonlawyer, if supervised by a lawyer and not acting independently, may offer legal advice to a client.

70. STATE BAR OF N.M., RULES GOVERNING PARALEGAL SERVICES R. 20-103 (2004), available at <http://www.nmbar.org/AboutSBNM/ParalegalDivision/PDRulesgovparalegalservices.html>.

71. The State Bar of New Mexico is an integrated bar with powers delegated from the Supreme Court of New Mexico. The Board of Bar Commissioners of the State Bar is a “bod[y]

C. Authority from the Common Law

No court has held that lawyers cannot delegate certain categories of supervised work to nonlawyers.⁷³ Many courts have disciplined lawyers for assisting in the unauthorized practice of law or for similar misconduct by improper delegation of legal tasks to nonlawyers,⁷⁴ in violation of each jurisdiction's respective version of Model

of the judicial department." N.M. STAT. § 36-2-9.1 (1979). I infer from that statute that the rules governing the legal profession issued by the State Bar are enforceable. An "integrated bar association" is an "association of attorneys in which membership and dues are required as a condition of practicing law in a State." *Keller v. State Bar of Cal.*, 496 U.S. 1, 5 (1990). For a discussion of integrated bar associations, see, for example, Elizabeth Chambliss & Bruce A. Green, *Some Realism About Bar Associations*, 57 DEPAUL L. REV. 425 (2008); Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35 (1994).

72. The Committee Commentary to explains the rules' "no legal advice" provision as follows:

Some activities which would involve the unauthorized practice of law if undertaken by the paralegal include: (a) independently recommending a course of conduct or a particular action to a client; (b) evaluating for or speculating with a client on the probable outcome of litigation, negotiations or other proposed action; (c) independently outlining rights or obligations to a client; and (d) independently interpreting statutes, decisions or legal documents to a client.

STATE BAR OF N.M., *supra* note 70, at R. 20-103 cmt. The repeated reference to "independently" indicates that the nonlawyer may communicate such information to a client if done under the supervision and monitoring of a licensed lawyer. For a discussion of the best understanding of a nonlawyer's role in counseling clients, see *infra* notes 143-45 and accompanying text.

73. Compare MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVICES Guideline 3 (2004) ("A lawyer may not delegate to a paralegal . . . (3) Responsibility for a legal opinion rendered to a client."), with *id.* at Guideline 3 cmt. (citing certain ethics opinions but failing to cite any court decisions or statutes in its discussion of the limitation on a nonlawyer offering legal advice). The comment to Guideline 3 cites the Kentucky Supreme Court Rules, the New Hampshire Supreme Court Rules, and the New Mexico State Bar Rules to support its proposition that paralegals are generally "forbidden from 'giving legal advice' or 'counseling clients about legal matters.'" *Id.* at Guideline 3 cmt. The citation to the Kentucky rule is particularly troubling, and perhaps inappropriate, because the cited rule explicitly permits supervised nonlawyers to offer legal advice. KY. SUP. CT. R. 3.700, Sub-Rule 2 (providing that "the unauthorized practice of law shall not include any service rendered involving legal knowledge or legal advice" so long as the client knows the individual is not a lawyer, the lawyer supervises the nonlawyer, and the lawyer retains ultimate responsibility). For a discussion about both the New Hampshire rules and the New Mexico rules in this regard, see *supra* notes 68-72 and accompanying text.

74. See, e.g., *People v. Laden*, 893 P.2d 771 (Colo. 1995) (public censure for lawyer "aiding nonlawyers in the practice of law by assisting the nonlawyers in selling 'living trust' document packages"); *People v. Cassidy*, 884 P.2d 309 (Colo. 1994) (attorney suspended, *inter alia*, for aiding nonlawyers in preparing and marketing "living trust packages"); *Fla. Bar v. Abrams*, 919 So. 2d 425, 428 (Fla. 2006) (attorney suspended for, *inter alia*, assisting layperson in practice of law); *Fla. Bar v. Beach*, 675 So. 2d 106 (Fla. 1996) (attorney suspended for assisting layperson in practice of law); *In re Mopsik*, 902 So. 2d 991 (La. 2005) (sixty-day suspension for failing to supervise a paralegal's work on a case, at least some of which constituted the unauthorized practice of law); *In re Sledge*, 859 So. 2d 671 (La. 2003) (lawyer disbarred, in part, for failure to supervise nonlawyer employees).

Rule 5.3,⁷⁵ Model Rule 5.5(a),⁷⁶ or some similar professional duty in that jurisdiction. Courts often include dicta indicating that a lawyer cannot delegate certain sensitive tasks, like the provision of legal advice, to a nonlawyer.⁷⁷ But each reported case in which a lawyer found himself or herself in trouble as a result of the use of a nonlawyer involved some variation of a failure of supervision of the nonlawyer.⁷⁸ No reported court decision has disciplined a lawyer or sanctioned a nonlawyer for competent, supervised activity by the nonlawyer.

Courts do say on occasion that lawyers cannot delegate certain categories of work to nonlawyers. For instance, the Louisiana Supreme Court, in an opinion disbaring a lawyer for assisting in the unauthorized practice of law by inappropriate delegation of legal work to a nonlawyer, offered one of the narrowest conceptions of the scope of permissible delegation:

[W]e conclude . . . that a lawyer may delegate various tasks to . . . non-lawyers; that he or she may not, however, delegate to any such person the lawyer's role of appearing in court in behalf of a client or of giving legal advice to a client; that he or she must supervise closely any such person to whom he or she delegates other tasks, including the preparation of a draft of a legal document or the conduct of legal research; and that the lawyer must not under any circumstance delegate to such person the exercise of the lawyer's professional judgment in behalf of the client or even allow it to be influenced by the non-lawyer's assistance.⁷⁹

This quote, intended perhaps to communicate a binding standard for Louisiana lawyers,⁸⁰ suggests a remarkably narrow scope of permissible delegation of authority

75. MODEL RULES OF PROF'L CONDUCT R. 5.3 (2009).

76. *Id.* at R. 5.5(a) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.").

77. See, e.g., *Fla. Bar v. Thomson*, 310 So. 2d 300, 302 (Fla. 1975) (nonlawyer work limited to that of a "preparatory nature"); *Doe v. Condon*, 532 S.E.2d 879, 880 (S.C. 2000) ("[A]nswering legal questions would constitute the unauthorized practice of law."); *In re Easler*, 272 S.E.2d 32, 32 (S.C. 1980) (explaining that paralegal work should be "limited to work of a preparatory nature").

78. See Jay M. Zitter, Annotation, *What Constitutes Unauthorized Practice of Law by Paralegal*, 109 A.L.R. 5th 275 (2003 & Supp. 2009). A review of the many cases collected in this Annotation reveals no instances in which a properly supervised paralegal, or the supervising lawyer, faced any sanctions, regardless of the type of work performed by the paralegal. One reported decision demonstrates that supervision is more important than the quality of the work. See *In re Pinkins*, 213 B.R. 818 (Bankr. E.D. Mich. 1997). The *Pinkins* court rejected, in part, a fee petition submitted by a "high volume filer" law firm in twenty-one bankruptcy cases. *Id.* at 819, 825. While the court found that the nonlawyers were "acting without direct supervision of an attorney," *id.* at 821, the court did not find that the services rendered were incompetent, *id.* In response to the firm's argument that "the legal assistants employed by the . . . law firm are very well trained, and that the legal services, although not provided by an attorney, are of the highest quality," the court noted that "[t]his argument misses the point. Legal assistants are not authorized to practice law." *Id.*

79. *La. State Bar Ass'n v. Edwins*, 540 So. 2d 294, 300 (La. 1989) (emphasis added).

80. See *id.* at 299–300 ("[T]he supreme authority resides in this court to define, by formal rules or by adjudication of cases, the acts or courses of conduct which constitute the practice of law. . . . In defining the practice of law for purposes of interpreting DR 3-101(A) [the

from lawyers to nonlawyers. It includes the common prohibition against “giving legal advice to a client,” but it proceeds to reinforce that ban with an edict forbidding lawyers even from accepting the influence of the nonlawyers with whom they work. That order is as nonsensical as it is unenforceable. It is also, fortunately, dictum.⁸¹

Like virtually all of the matters reviewed by state courts in this area, the facts of the matter before the Louisiana Supreme Court did not even come close to a lawyer having delegated supervised activity to a nonlawyer assistant or accepting some insights from the nonlawyer. The story of *Louisiana State Bar Association v. Edwins* is one of grossly unauthorized practice by a nonlawyer with no supervision by a lawyer, and with a heady dose of malpractice thrown in. Rallie C. Edwins, a Baton Rouge lawyer, had agreed to take over the Louisiana business of one Rob Robertson, who had been “operat[ing] a free lance paralegal service in New Iberia under the name of Prepaid Legal Services, Inc.”⁸² Edwins changed the name of Robertson’s office to his law firm name, but retained his own law office in Baton Rouge. Robertson then independently met in his New Iberia office a man who had a personal injury claim, told the man that he, Robertson, was a lawyer, filed suit in Edwins’s name on the man’s behalf, and soon settled the case for a \$1000 net payment to the man, without obtaining the man’s informed consent or providing him any advance notice of the terms of the settlement.⁸³

Not surprisingly, the Louisiana Supreme Court was not amused. It found “an ongoing relationship in which Edwins allowed Robertson to perform legal tasks without supervision and to exercise professional judgment properly reserved only for attorneys.”⁸⁴ The court imposed a sanction of disbarment.⁸⁵

The *Edwins* matter, while perhaps a bit extreme in the level of malfeasance and lack of supervision, is typical of the cases in which courts discuss the limits of nonlawyer assistance. Courts employ language indicating categorical and often narrow limits on a lawyer’s discretion to delegate activity to an assistant, but the facts of the matters being decided consistently demonstrate a patent absence of supervision and oversight. If one ignores the dicta, then, one would conclude confidently the following insight from the common law authority—lawyers may not, on penalty of assisting unauthorized practice, delegate unsupervised activity to nonlawyers. That is the only lesson available from the common law authority. The lesson tells us nothing about the limits of responsible, supervised delegation.

disciplinary rule applicable to this matter], this court may consider as persuasive, but not binding, pertinent legislative expressions.”).

81. Note that the ABA’s *Model Guidelines for the Utilization of Paralegal Services* expressly disagree with the sentiment expressed by the Louisiana Supreme Court. MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. Guideline 3 cmt. (2004) (“[A] lawyer who permits a paralegal to assist . . . in preparing the lawyer’s legal opinion is not delegating responsibility for [that] matter[] and, therefore, is not in violation of this guideline.”).

82. *Edwins*, 540 So. 2d at 297. Under any relevant legal standard, a nonlawyer offering prepaid legal services would be engaged unlawfully in the unauthorized practice of law. *See, e.g., Fla. Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978).

83. *Edwins*, 540 So. 2d at 297. Even a licensed lawyer may not settle a client’s matter without obtaining the client’s informed consent. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2004); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22(1) (2002); WOLFRAM, *supra* note 4, § 4.6.2, at 169–70.

84. *Edwins*, 540 So. 2d at 301.

85. *Id.* at 304.

D. Insights from the Attorney-Client Privilege Cases

While no court has expressly declared (aside from in dictum) that a lawyer may not delegate certain categories of legal activity to her nonlawyer assistant, neither has any court expressly held that such delegation of the most commonly cited forbidden activity—providing legal advice to a client—is in fact proper. No reported decision appears, for instance, where a court has reviewed a disciplinary matter against a lawyer charged with assisting the unauthorized practice of law by delegating a supervised legal counseling task to a nonlawyer, and then proceeded to find the delegation proper.⁸⁶ On that specific question within the realm of professional discipline, no discrete common-law authority exists on either side of the matter. Several courts, though, have implicitly concluded that a lawyer's delegation to a nonlawyer of the task of communicating legal advice is indeed proper.⁸⁷ The topic arises in cases reviewing claims of attorney-client privilege.

In reviewing assertions of attorney-client privilege⁸⁸ in circumstances involving communications between clients and paralegals working for an attorney, several courts have concluded that legal advice communicated by a nonlawyer to a client is within the scope of the attorney-client privilege if the nonlawyer was acting under the supervision of the licensed lawyer.⁸⁹ Consistent with that principle, courts have denied the claim of privilege after concluding that the nonlawyer was acting independent of the lawyer's supervision, and not as an integral part of the lawyer's provision of legal services.⁹⁰ In both instances, the relevant consideration is whether the nonlawyer was offering

86. See Zitter, *supra* note 78 (ALR compilation reviewing available decisions on nonlawyer practice limitations, and showing no such case).

87. See, e.g., *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 145 F.R.D. 298 (E.D.N.Y. 1992); *Foseco Int'l Ltd. v. Fireline, Inc.*, 546 F. Supp. 22 (N.D. Ohio 1982); *Smart Indus. Corp. v. Superior Court (Bradshaw)*, 876 P.2d 1176 (Ariz. Ct. App. 1994).

88. The attorney-client privilege is a common-law doctrine protecting communications between a lawyer and a client made for purposes of obtaining or providing legal assistance. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68–82 (2002); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (John T. McNaughton rev. ed. 1961).

89. See, e.g., *Stryker Corp.*, 145 F.R.D. at 305 n.3 (“[A]ttorney-client privilege may apply to communications between an attorney, client and an independent patent agent, ‘if that patent agent is working on behalf of and under the direction of the attorney.’”); *Foseco Int'l Ltd.*, 546 F. Supp. at 25 (stating that privilege applies where a “patent agent is acting at the direction or control of an attorney as the agent of the attorney”); *Bradshaw*, 876 P.2d at 1181 (stating that privilege applies to communications with nonlawyer given “the necessary role of nonlawyer assistants in modern litigation practice”).

90. See, e.g., *HPD Labs., Inc. v. Clorox Co.*, 202 F.R.D. 410, 411, 415 (D.N.J. 2001) (paralegal offered her own independent counsel); *Byrnes v. Empire Blue Cross Blue Shield*, No. 98Civ.8520(BSJ)(MHD), 1999 WL 1006312, at *4 (S.D.N.Y. Nov. 4, 1999) (noting that the privilege does not “cover communications between a non-attorney and a client that involve the conveyance of legal advice offered by the non-attorney”); *John Labatt Ltd. v. Molson Breweries*, 898 F. Supp. 471, 477 (E.D. Mich. 1995) (finding privilege inapplicable because legal employee did not act as a conduit to and from counsel); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 360–61 (D. Mass. 1950) (finding that privilege did not apply to patent department employees rendering their own legal and business advice).

independent advice unconnected to the lawyer's work and supervision, or whether the nonlawyer's advice was essentially a "conduit"⁹¹ for the lawyer's judgment.⁹²

The courts addressing the privilege question accept that nonlawyers will meet with clients and discuss the law. As one federal district court judge wrote, "There is nothing wrong with Clorox employees [(the law firm's clients)] using Ms. Peeff [(a law firm paralegal)] as a legal resource"⁹³ If the legal information communicated by the nonlawyer represents her transmission of advice crafted with the lawyer's supervision and under the lawyer's responsibility, the privilege will apply, even if the attorney does not speak the words to the client.⁹⁴ By contrast, if the nonlawyer communicates her own independent and unapproved legal advice, the claim of privilege fails.⁹⁵

Of course, decisions interpreting the scope of the attorney-client privilege are not directly dispositive on the questions surrounding the unauthorized practice of law. They do, however, offer constructive support for the proposition that supervised nonlawyers may, under the right circumstances, provide legal advice to clients. The attorney-client privilege only applies to communications related to the provision of legal advice.⁹⁶ The case law holds that a nonlawyer's communications to a client about legal matters will fall within the scope of the privilege if the nonlawyer is supervised by a lawyer and is communicating to the client as part of a lawyer's representation of

91. See *HPD Labs.*, 202 F.R.D. at 416; *Labatt Ltd.*, 898 F. Supp. at 477 (employing the "conduit" concept).

92. See *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 435 (W.D.N.Y. 1997) (no privilege absent proof that non-attorney was hired to assist counsel); *Nat'l Hockey League Players' Ass'n v. Bettman*, No. 93Civ.5769(KMW), 1994 WL 38130, at *12 (S.D.N.Y. Feb. 4, 1994) ("constructive employee" theory); *Stryker Corp.*, 145 F.R.D. at 305 n.3 (same); *Foseco Int'l Ltd.*, 546 F. Supp. at 25 ("direction and control"); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 146 (D. Del. 1977) (holding a nonlawyer communication may fall under attorney-client privilege if the nonlawyer was "working at the direction of and under the supervision of an attorney"); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 39 (D. Md. 1974) (noting that documents prepared at lawyer's direction may be protected); *Congoleum Indus. v. G.A.F. Corp.*, 49 F.R.D. 82 (E.D. Pa. 1969), *aff'd*, 478 F.2d 1398 (3d Cir. 1973) (same); *cf. United States v. Nobles*, 422 U.S. 225, 238 (1975) (stating that the work product doctrine "protect[s] materials prepared by agents for the attorney"); *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995) (recognizing that "the privilege . . . can extend to shield communications to others when the purpose of the communication is to assist the attorney in rendering advice to the client"); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (same); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 503(a)(3)[01], at 503-26 to -27 (1990) (privilege protects communications to attorney's agents).

93. *HPD Labs.*, 202 F.R.D. at 415.

94. *Id.* at 416 (privilege applies if the nonlawyers "pass on that attorney's advice to the client" (citing *Labatt Ltd.*, 898 F. Supp. at 477) or "advice formulated 'under the supervision and at the direction of an attorney'" (quoting *Byrnes*, 1999 WL 1006312, at *4)).

95. See *id.* ("Courts do not, however, safeguard advice that paralegals develop and disseminate on their own."); *cf. United Shoe Mach. Corp.*, 89 F. Supp. at 360-61 (finding that privilege did not apply to patent department employees who rendered their own legal and business advice).

96. See *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999) (noting that "the privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client"); NATHAN M. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* 265-67 (4th ed. 2008).

the client. That common-law authority refutes the broad claims from some advisory sources and court dicta that nonlawyers may not offer legal advice to a client. It also permits us to understand better the contextual nature of the ban on giving legal advice. That ban only makes sense when applied to entirely *independent* legal advice, unsupervised by a lawyer and reliant entirely on the skill and judgment of the nonlawyer. A prohibition on that activity is a sensible one, assuming again, for present purposes, the validity of the unauthorized-practice-of-law dogma.⁹⁷

III. A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING DELEGATION TO NONLAWYERS

A. Introduction and Overview

Up to this point we have seen that much of the advisory authority from bar associations and professional associations warns attorneys about categorical limits on what tasks they may permissibly and lawfully delegate to the nonlawyers with whom they work, and those authorities most often declare that an attorney may not delegate to a nonlawyer the responsibility of giving legal advice. Occasionally, those authorities also include negotiation as a nondelegable task.⁹⁸ We have also seen, though, that there is no binding legal authority establishing such a categorical proscription. No lawyer has ever been disciplined or charged criminally, and no nonlawyer has ever been charged criminally, for supervised, responsible work performed by a nonlawyer as part of a lawyer's representation. We may thus conclude that the state of the law in this area is, at best, uncertain and confusing.

This Part responds to that uncertainty and confusion. I propose here a conceptual framework for guiding lawyers in their delegation decisions. The framework is consistent with the slim available substantive law, and in fact it is consistent as well with most of the advisory authority, once interpreted through a lens of practical lawyering judgment. The conceptual framework I suggest understands the lawyer's delegation of work to a nonlawyer as essentially a question of risk management, appraised by the lawyer's practical wisdom and subject to her client's informed consent. Understood as such, a practicing attorney could accept comfortably the thesis introduced at the beginning of this Article—a thesis that rejects categorical exclusions in favor of a discretionary standard governed by professional competence and fiduciary-duty-of-care considerations.

To develop this conceptual framework, I first describe briefly the roles that risk management and client-centered decision making play in ordinary lawyering practice and connect those normative constructs to the prevailing understanding of

97. See *supra* notes 6–9 and accompanying text.

98. See, e.g., FLA. BAR, FLORIDA ETHICS GUIDE FOR PARALEGALS AND ATTORNEYS WHO UTILIZE PARALEGALS, Part III (2006) (“A nonlawyer who engages in negotiations risks committing [unauthorized practice of law].”); Fla. Bar Comm. on Prof'l Ethics, Ethics Op. 74-35 (1974) (negotiating with insurance adjusters “always involve[s] the exercise of the lawyer's professional judgment”); cf. Fla. Bar v. Neiman, 816 So. 2d 587, 591 (Fla. 2002) (discussing a nonlawyer's improper negotiation, with no supervision); State *ex rel.* Or. State Bar v. Lenske, 584 P.2d 759, 764 (Or. 1978) (implying negotiation would be improper for a nonlawyer, but finding no unauthorized practice of law because of presence of lawyer in the office).

unauthorized-practice dogma. I then build upon that understanding to evaluate the categories of activities that the authorities reviewed above consistently recognize as properly delegable to nonlawyers: document drafting, legal research, fact investigation, and client interviewing. Each permissive activity category obtains its justification because of a perceived, underlying risk/benefit assessment supported by an assumed or explicit client buy-in. Having unpacked those permissive categories, I then examine one purported forbidden activity, legal counseling. We shall see that an application of the same risk management and informed consent heuristics, with an appreciation of the unauthorized-practice rationales, would not categorically deny a lawyer the opportunity to delegate a counseling task to a properly supervised and talented nonlawyer if in the lawyer's judgment the result would be competent and efficient legal work for which the lawyer remains fully responsible.

B. Risk Assessment, Informed Consent, and Unauthorized-Practice Rationales

1. Risk Assessment and Practical Judgment

This Subpart describes briefly three readily accepted lawyering conceptions, all of which are essential to an understanding of the subject of delegation to nonlawyers. Competent lawyering always involves responsible assessment of risk and appreciation of the cost/benefit probabilities inherent in any course of legal activity on a client's behalf.⁹⁹ A lawyer representing a client must always exercise her professional judgment to discern when she has done enough legal work, what form that legal work will take, and when to proceed to the next step in her strategic plan.¹⁰⁰ Except in the most banal or routine of matters,¹⁰¹ a lawyer can never be certain that her lawyering activity will

99. See, e.g., GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 202–304 (1978) (one of the earliest, and one of the best, explorations of strategic planning in lawyering); SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM* 141–50 (1992) [hereinafter *THE MACCRATE REPORT*] (discussing “problem solving”); Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 192 (2002) (connecting lawyering judgment to understanding risk considerations).

100. See, e.g., ROY STUCKEY, *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* 149 (2007) (“practical wisdom”); WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOYD & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 115–20 (2007) (“wisdom of practice”).

101. One can imagine purely routine or technical legal matters where a lawyer need not exercise judgment in order to accomplish a desired result for a client. However, as both the legal realists and the critical legal studies (CLS) scholars have taught us, the legal process is seldom that mechanical. See Scherr, *supra* note 99, at 183–95, 201–06 (developing the connection between lawyering judgment and the indeterminacy recognized by realists and critical legal studies adherents). For a discussion of realists and CLS thinkers, see Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 559 (1986) (rejecting the argument “that the only permissible course of action for a judge confronting a conflict between the law and how he wants to come out is always to follow the law” (emphasis omitted)); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 469–70, 536–41 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*

achieve the result she seeks, but she uses her experience and her wisdom to proceed in a way that maximizes the likelihood of reaching her goal.¹⁰² Exercising sound lawyering judgment—with an appreciation for and careful calculation of the available risks—is the hallmark of wise and competent lawyering.¹⁰³

Consider the simplest of examples. Imagine that a client, Barbara, has retained a lawyer, Shawn, to represent her in a dispute with a contractor, Jeffrey, who has abandoned and not completed the agreed-upon work on her kitchen for which Barbara has paid him. In this straightforward breach-of-contract matter, Shawn might engage in the following tasks: He could interview Barbara, perform some legal research, develop a strategy for his proceeding lawyering work, contact Jeffrey informally and then formally through a demand letter, file a lawsuit in the state trial court, perform discovery and file and respond to pretrial motions, negotiate with Jeffrey's lawyer, counsel Barbara about settlement possibilities, and conduct the trial. For any one of these tasks, Shawn must make calculated predictions and assessments about how to proceed, using his developed lawyering judgments. In his initial interview of Barbara, for instance, Shawn might spend an hour with his client, asking both open-ended questions and narrow, focused inquiries.¹⁰⁴ He would end the interview without knowing for certain whether he has learned everything relevant to the matter at hand. He could interview Barbara for days, asking every question imaginable, but he will not do so, even if doing so is objectively safer for his information-gathering goals.¹⁰⁵ Similarly, he will conduct some research, but after some effort he will stop that task as well, believing (but without complete certainty) that he has an adequate grasp of the substantive law. We could repeat this analysis for any one of the tasks on the above list.¹⁰⁶

(1986)) (explaining legal realism and its connection to critical legal studies).

102. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 16 (1993) (developing the notion of practical wisdom as the soul of good lawyering); Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 252–56 (1998) (explaining practical judgment); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 58–64 (1995) (same).

103. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 814 (1989); Scherr, *supra* note 99, at 218–29.

104. See DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004) (describing methods of interviewing).

105. See KENNEY F. HEGLAND, *TRIAL AND PRACTICE SKILLS IN A NUTSHELL* 32–33 (3d ed. 2002) (explaining the tendency to “fill” when hearing incomplete stories).

106. Consider one further example of this point. Shawn might file a motion to compel discovery after Jeffrey's lawyer objects to a request for production of documents. See, e.g., FED. R. CIV. P. 37 (the federal rule permitting such a motion and imposing sanctions for failure to respond to proper discovery; all states have an equivalent rule). In his choice to file the motion, Shawn engages in a risk/benefit assessment—will the tactic succeed at a reasonable cost? Even his drafting of the motion involves calculation of risk. He could file a two-page motion or a four-page motion (or, conceivably, a 250-page motion). He will make certain arguments but not others. He will make those choices by assessing, usually implicitly, the costs and benefits of the available choices. See THOMAS A. MAUET, *PRETRIAL* § 6.15, at 293 (5th ed. 2002) (“[A]lways consider *not* moving to compel discovery.” (emphasis in original)).

The point is that lawyers develop professional and practical judgment that permits them to assess and manage risks and uncertainty.¹⁰⁷ Clients hire lawyers in large part for this talent. But, at the same time, lawyers facing known risks cannot presume that their clients' risk aversion is the same as theirs.¹⁰⁸ For this reason, the exercise of lawyering judgment is constrained by a powerful factor—the buy-in from the client.

2. Informed Consent

Lawyers are agents; their clients, principals. Lawyers act for, and at the behest of, their clients.¹⁰⁹ While the lawyer develops the intricacies of the strategies and provides most of the expertise in lawyering practice, the client ultimately decides the fate of the collaborative work and the course of the representation.¹¹⁰ This statement is both a truism and an overstatement. In light of the preceding discussion about risk management,¹¹¹ it is impossible for a lawyer to include her client in all of the cost/benefit decisions she must make on a daily basis.¹¹² But on matters that may be identified as representing important risk-driven junctures in a matter, the lawyer ought to ensure that the client decides, because it is the client's comfort with risk that matters, not the lawyer's.¹¹³ This recognition is the essence of client centeredness.¹¹⁴

107. See JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) [hereinafter JUDGMENT UNDER UNCERTAINTY]; Susan Bryant & Elliot S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?*, 14 CLINICAL L. REV. 195, 208–09 (2007) (“[P]rofessional work involves exercising practical judgments under conditions of uncertainty.”).

108. See BINDER ET AL., *supra* note 104, at 7, 296 (suggesting lawyers explore their clients' risk aversion scales). See generally DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 139–53 (2008) (explaining the complexities of making choices); JOHN S. HAMMOND, RALPH L. KEENEY & HOWARD RAIFFA, SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS 135–39 (1999) (discussing people's differences in risk tolerance); JONAH LEHRER, HOW WE DECIDE 133–66 (2009) (exploring individuals' deliberation processes).

109. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2002) (“A lawyer is a fiduciary.”).

110. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2004); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 21–22 (2002); see also William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 225 (1991) (examining the usual assumptions about client control and autonomy).

111. See *supra* notes 104–07 and accompanying text.

112. See BINDER ET AL., *supra* note 104, at 275–80; see also Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 51, 124 (1979) (noting the traditional proposition that substantive decisions rest with the client, while procedural and tactical decisions typically rest with the lawyer, but critiquing that distinction).

113. BINDER ET AL., *supra* note 104, at 296; see also ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 26–27 (1990) (relating Carl Rogers' “client-centered” psychotherapy); ROBERT F. COCHRAN, JR., JOHN M.A. DIPPIA & MARTHA M. PETERS, THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 6–9 (2d ed. 2006); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 507–09 (1990).

Lawyers, then, may accept whatever level of risk taking or risk aversion the client chooses, subject to the limits of the substantive law. Together, the lawyer and client may collaborate about the measures the lawyer will take to accomplish the client's goals, including the cost/benefit assessment of delegating some important tasks to a nonlawyer. The substantive law of lawyering does not limit the lawyer and her client in that collaborative enterprise except in two ways. First, the law prohibits a lawyer from counseling her client to engage in illegal conduct, even if the client is willing to take the risk of avoiding detection.¹¹⁵ Second, the law prohibits a client, even a sophisticated and fully informed client, to accept the risk of proceeding in her legal case with the representation of a nonlawyer alone.¹¹⁶ That paternalistic¹¹⁷ stance forms the basis for the unauthorized-practice-of-law dogma.

3. Unauthorized-Practice Rationales

The final subject we must review briefly to complete the backdrop for the nonlawyer delegation framework is that of unauthorized practice of law. The unauthorized-practice dogma is premised on a purely prophylactic sentiment—that consumers and clients will receive the best legal services and the best protection if their choice for representation is limited, by law, to members of the bar.¹¹⁸ Its adherents would readily accept that the unauthorized-practice dogma is overbroad, as all prophylactic provisions are.¹¹⁹ In some instances it will be true that some nonlawyers would know far better than some lawyers how to proceed to obtain the best results for a client.¹²⁰ In general, though, lawyers will serve clients better than nonlawyers would,

114. See BINDER ET AL., *supra* note 104, at 7–8; Dinerstein, *supra* note 113, at 585. For an insightful application of client-centered decision making and risk assessment in the context of representation of immigrants, see Christine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355, 408–15 (2008).

115. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1588–90 (1995).

116. See CRYSTAL, *supra* note 96, at 480 (summarizing the unauthorized-practice-dogma argument that “lay people are unable to evaluate the competency of nonlawyers”).

117. See Rhode, *Policing the Professional Monopoly*, *supra* note 5, at 98–99 (labeling unauthorized practice as “paternalism”); Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem That Won't Go Away*, 34 ARIZ. ST. L.J. 585, 600 (2002) (“[I]f an individual makes a voluntary and knowing choice to use a non-lawyer because she believed it would be better or cheaper than a lawyer, eliminating that alternative is paternalistic and inconsistent with the policy favoring individual client autonomy that underlies the law of lawyering.”).

118. CRYSTAL, *supra* note 96, at 480; RHODE, *supra* note 3, at 74–77, 83.

119. The unauthorized-practice dogma is an example of the use of a rule, with clear dividing lines, instead of a standard, with discretion available. The rules/standards dichotomy is a long-standing one in legal regimes. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 571 (1992); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381–82 (1985). For a discussion of the use of prophylactic rules, notwithstanding their overbreadth, see David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988); Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343, 344–45 (2002).

120. See Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their*

and because it will be difficult or even impossible to ascertain which nonlawyers might be better qualified than a given lawyer, the policy underlying the unauthorized-practice dogma insists upon its inflexible, bright-line test to assure, as a reliable proposition, the best service to clients.¹²¹

Two other realities of the unauthorized-practice dogma deserve mention for our purposes. First, it is obvious that the unauthorized-practice laws favor lawyers' professional and business interests and are supported most strongly by the organized bar.¹²² It is an anticompetitive social policy, one that tends to inflate lawyers' incomes.¹²³ Second, unauthorized-practice laws manifest a deep trust in lawyers and their wise judgments about their own competence. The dogma's lack of nuance—its explicit assumption that, as a rule, any lawyer will be a better representative of a client than any nonlawyer, regardless of the latter's expertise and experience—imposes upon lawyers a fiduciary duty to recognize when they are not competent to accept representation of a client. That manifestation of trust ought to play an important role in understanding the proper scope of a lawyer's delegation discretion.

*C. The Nonlawyer Delegation Framework as an Alchemy of Risk Management,
Informed Consent, and Unauthorized-Practice Prophylaxis*

1. The Alchemy

Consideration of the three factors we have just examined establishes that lawyers ought to have discretion to delegate to nonlawyers any tasks which, in the lawyer's professional judgment and subject to the informed consent of the client, will provide the best and most efficient legal services to the client. Any substantive-law constraint depriving a lawyer of the discretion to delegate certain categories of activity would be inconsistent with the practice philosophies accepted within the legal profession. The lawyer-discretion model builds upon the trust that lawyers will recognize competence gaps and will manage risk responsibly, and will only delegate activities to nonlawyers if the lawyer's client has bought in to any significant risk taking. For reasons of economy and efficiency, a client is likely to buy in if the lawyer oversees the delegation and vouches for its soundness.

A lawyer who elects to use a nonlawyer assistant to complete some legal tasks frequently does so for the benefit of the client. Any task assigned to a nonlawyer

Derivation, Their Development, and Some Implications for the Core Values Debate, 84 MINN. L. REV. 1115, 1146–49 (2000) (noting and critiquing the argument that nonlawyers are less qualified than lawyers, but acknowledging some settings where it holds true); Judith L. Maute, *Pre-Paid and Group Legal Services: Thirty Years After the Storm*, 70 FORDHAM L. REV. 915, 929 (2001) (labeling the unauthorized-practice doctrine “prophylactic”).

121. Green, *supra* note 120, at 1146; Hurder, *supra* note 4, at 2264–66 (noting the breadth of the unauthorized-practice restrictions and proposing more tailored regulation); Margulies, *supra* note 7, at 288.

122. See WOLFRAM, *supra* note 4, at 833–34; Rhode, *Professionalism*, *supra* note 6, at 711–12.

123. Cf. Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 764–65 (2001) (noting that the ABA has ignored the suggestions of its Commission on Nonlawyer Practice that recommend allowing delivery of legal services from other sources); Deborah Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 GEO. J. LEGAL ETHICS 209, 232–33 (1990).

assistant could, of course, be performed by the lawyer, but at a higher price. The use of nonlawyers provides a more efficient delivery of legal services at a lower price than if the lawyer acted alone;¹²⁴ the resort to the use of nonlawyer services is thus financially adverse to the lawyer's interests, at least most of the time.¹²⁵ A client might prefer that arrangement for the same reasons that a client might prefer to hire a lay advocate instead of a lawyer in order to save money;¹²⁶ in this instance, contrary to the request for a lay advocate, the law permits a client to make that choice, because the client has a lawyer available to monitor the work. The lawyer will only choose to employ the nonlawyer assistance when it makes sense for the client's case, given the client's economic needs and the client's risk aversion.¹²⁷ A client will only agree to nonlawyer assistance when he trusts the lawyer's judgment, accepts the risk, and welcomes the cost savings. The unauthorized-practice dogma has no complaint, both because the nonlawyer's work will be evaluated and monitored in accordance with the lawyer's

124. Of course, a lawyer cannot charge a client her hourly rate for work performed by a nonlawyer (although some have been caught doing so). For articles dealing with deception in billing practices generally, see Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990); Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63 (2008); William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991).

125. If the supply of lawyers' services is elastic and relatively unlimited, then a law firm would prefer to earn higher fees by using a lawyer instead of a nonlawyer for any given task. In practice, though, lawyer supply is not necessarily elastic at any given moment. A lawyer's personal time is, of course, finite, so it might be in the lawyer's interest to delegate tasks to a nonlawyer assistant to free the lawyer to earn more money working for a different client. For a discussion of the elasticity/inelasticity of legal services within law firms, see, for example, Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1875–77 (2008) (describing newly developing "elastic" techniques within law firms to maximize profit); Amelia J. Uelman, *The Evils of "Elasticity": Reflections on the Rhetoric of Professionalism and the Part-Time Paradox in Large Firm Practice*, 33 FORDHAM URB. L.J. 81, 98–103 (2005) (describing how law firms arrange coverage to accommodate fluctuating demand); William Kummel, Note, *A Market Approach to Law Firm Economics: A New Model for Pricing, Billing, Compensation and Ownership in Corporate Legal Services*, 1996 COLUM. BUS. L. REV. 379, 382–93 (1996) (analyzing and critiquing law firm productivity and resource allocation).

126. See Rhode, *Policing the Professional Monopoly*, *supra* note 5, at 88.

127. In addition to the inelasticity issue, see *supra* note 125, a lawyer may benefit financially by her use of the nonlawyer's assistance if she is offering services at a flat rate and not through a billable-hour arrangement. For a sampling of the critique of hourly billing, see, for example, Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171 (2005); Lawrence J. Fox, *End Billable Hour Goals . . . Now*, 17 NO. 3 PROF. LAW. 1 (2006); Lerman, *supra* note 124, at 713–14; Richmond, *supra* note 124, at 91–93; Ross, *supra* note 124, at 78–83. In those settings, the lawyer and her firm benefit if much of the work is performed by lower-priced nonlawyers. That apparent conflict of interest is mitigated by two factors, however. First, a lawyer ought to obtain the informed consent of the client before delegating any substantial tasks to a nonlawyer. See BINDER ET AL., *supra* note 104, at 275–80 (arguing that clients control all substantive decisions in the representation); Spiegel, *supra* note 112, at 43 (same). Second, because the lawyer remains responsible for the ultimate product and must achieve competent work, the lawyer has little incentive to exploit any seeming conflict by employing shoddy, cheap labor.

professional judgment (which the dogma trusts), and because the scheme does not present anticompetitive threats to the legal profession.

I thus envision the following confluence: A lawyer who, against her economic interests perhaps, opts to generate a more efficient work product by the judicious delegation of tasks to a competent nonlawyer; and a client who, understanding the fiduciary responsibility of his lawyer to protect his interests and desirous to obtain the most inexpensive responsible legal services from the lawyer and her firm, accepts his lawyer's delegation of tasks to the supervised nonlawyer; and the legal profession which, trusting the lawyer's judgment and foreseeing little anticompetitive threat from the use of nonlawyers, sees no basis to ban the concept of delegation. Those collective actors with those overlapping interests ought to support a lawyer's delegation authority and discretion. Those actors would be challenged to justify a categorical ban preventing a lawyer from choosing to delegate certain selected tasks to nonlawyer assistants.

2. A Taxonomy: Drafting, Legal Research, Fact Investigation, Legal Counseling

A nonlawyer employed by a lawyer to assist in her practice performs important tasks which the lawyer, because of her delegation to the nonlawyer, will not perform herself. I refer to the tasks as *important* because they are essentially that—without those tasks, the lawyering would not achieve its ends, or would be incomplete.¹²⁸ Someone must perform those tasks; in the settings we are exploring, it is the nonlawyer, and not the lawyer, who performs them. The lawyer, of course, must *supervise* the performance of the tasks by the nonlawyer, but supervision cannot mean, and does not mean, that the lawyer must accompany the nonlawyer and observe his performance of the tasks. No reasonable understanding of supervision contemplates such close monitoring, and any such proposal would be an absurd understanding of the use of legal assistants. Nor must the lawyer repeat the work of the nonlawyer to ensure its accuracy or soundness, for the same obvious reasons.

Supervision, then, will mean something different from constant monitoring or replicating the nonlawyer's work. If supervision has any substantive meaning, it must mean that the lawyer, who is the only person on the team who may orchestrate the lawyering work in its final form, must be confident, within the realm of reason,¹²⁹ that the nonlawyer has gotten the task right.¹³⁰ Consider four examples of tasks which a

128. See, e.g., *Pincay v. Andrews*, 389 F.3d 853, 856 (9th Cir. 2004) (“[T]he delegation of [attending to court deadlines] to specialized, well-educated non-lawyers may well ensure greater accuracy in meeting deadlines than a practice of having each lawyer in a large firm calculate each filing deadline anew.”).

129. The use of nonlawyers within law firms invites inevitable risk, risk that the practice schemes accept as a worthwhile compromise, if only because of the cost effectiveness of using nonlawyers instead of lawyers for certain tasks. See, e.g., *In re Opinion No. 24 of Comm. on Unauthorized Practice of Law*, 607 A.2d 962, 966–68 (N.J. 1992) (noting the importance of paralegal use in saving clients money).

130. See Chavkin, *supra* note 18, at 1543 (a clinical supervisor's role is to prepare students to respond responsibly to fluid events); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 147 (1994) (“In supervision the teacher can . . . assess the students' ability to draw upon the concepts they have learned and act

lawyer might choose to delegate to a nonlawyer: drafting documents; performing legal research; performing factual research; and advising clients about the state of the law and the options available to them. As we have seen above,¹³¹ the advisory authority regularly permits a lawyer's delegation of the first three of these, but often prohibits a lawyer from delegating the fourth, the offering of legal advice. A comparison of these four tasks will help us to understand the function and the limitations of the concept of "supervision." It will also show us that acceptance of the propriety of the first three activities' delegation requires acceptance of the propriety of the last activity's delegation.

a. Document Drafting

The first example—drafting a legal document such as a pleading—might serve as an easy beginning example. It is a task categorically permitted to be delegated to a nonlawyer by virtually all authorities,¹³² and its acceptability may be understood by reference to the risk-assessment heuristic. Consider a lawyer who delegates to a nonlawyer the task of drafting a standard motion using templates available within the law firm. The lawyer will be able to evaluate with a high degree of confidence whether the resulting product reads properly and includes the language, the clarity, and the elements necessary for the motion to achieve its purpose. The lawyer likely saves time by delegating the task to a nonlawyer, but the quality of the resulting work may be perfectly evaluated by the lawyer. The risk management by the lawyer is cabined and easily assessed.

For other documents, however, the risks of delegation may be more pronounced or unclear. A lawyer who delegates to a nonlawyer the task of choosing from among a selection of sample templates, or perhaps to create a first draft of a pleading without employing any template, may not be able to assess with the same level of confidence whether the resulting document achieves its purpose as well as if the lawyer had drafted the pleading herself. Nevertheless, some lawyers might ask a nonlawyer to create such a document in an exercise of her lawyering judgment, to save time for the lawyer and money for the client. The lawyer will accept some small possibility that the resulting work will fail to achieve its purposes, but that risk assumption is an ongoing enterprise for the lawyer.¹³³

in light of their understanding.”).

131. See *supra* notes 40–97 and accompanying text.

132. See, e.g., CONN. BAR ASS'N, GUIDELINES FOR LAWYERS WHO EMPLOY OR RETAIN LEGAL ASSISTANTS Guideline 2 (1997), <http://www.ctbar.org/article/view/197/1/57> [hereinafter CONN. BAR GUIDELINES] (“drafting legal documents” permitted); ETHICS ADVISORY COMM., S.C. BAR, ETHICS ADVISORY OPINION 02-12 (2002) (“composition of legal documents”); Utah State Bar Ethics Advisory Opinion Comm., Opinion No. 99-02 (1999) (“[Nonlawyers] may perform a wide array of services, including . . . drafting documents or pleadings.”) [hereinafter Utah Ethics Op. No. 99-02]. No court has ever suggested that nonlawyers may not draft documents, except when the drafting occurs without lawyer oversight. See, e.g., *United States v. Hardy*, 681 F. Supp. 1326, 1328–29 (N.D. Ill. 1988) (concluding that drafting simple documents that require some degree of legal knowledge is practice of law); *Lynch v. Cannatella*, 122 F.R.D. 195, 198–99 (E.D. La. 1987) (holding that an attorney could not allow a legal secretary to prepare, sign, and file an amended complaint, *aff'd*, 860 F.2d 651 (5th Cir. 1988)).

133. Drafting tasks are the easiest assignments to justify using the risk assessment benchmark, because the lawyer supervising the assignment sees the complete product generated

b. Legal Research

Contrast the pleading-drafting task with the next example—performing legal research, another task categorically permitted by the advisory authorities.¹³⁴ For legal research, the lawyer's confidence in the resulting work product may be high (the results can fit comfortably within the lawyer's understanding of the substantive law as she has understood it), but it simply cannot be as high as in the first motion example above. If the lawyer's case requires legal research, a task for which the client will be charged and which the lawyering responsibilities require, the necessary assumption is that the lawyer does not know for sure what the law is without looking it up. Few lawyers know the law perfectly without looking it up, and, for those few lawyers, their knowledge is likely limited to narrow and frequently repeated contexts.¹³⁵ When a nonlawyer performs legal research, then, the supervision by the lawyer means that the lawyer uses her best legal judgment—the legal judgment she has acquired by her membership in the profession and her practice experience—that the results of the research, as reported by the nonlawyer, are sufficiently reliable that the lawyer may use the results in moving ahead with her strategic development, advocacy, and negotiation. Like with the drafting task, the ultimate question for the lawyer is whether the quality of the work product is sufficiently high to permit her to use it in her ongoing work.

c. Fact Investigation

The next example—factual research—demonstrates a potentially higher level of risk, but risk whose magnitude the lawyer might reasonably assess and account for in her work. Once again, performing fact investigation and interviewing clients are responsibilities regularly understood as permissible activities for a lawyer to delegate

by the nonlawyer. The risks still exist, though, in at least two ways. First, by not drafting the pleading herself, the lawyer's thought process has changed, and she may miss in reviewing a completed document some considerations she would have discerned if she engaged in the creative drafting herself. Scholars have noted that writing is a form of thinking. *See* Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 155 (1999) (“[W]riting is a process for constructing thought.”); Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 140 (1987) (“[T]he writing process . . . alters and enriches the nature of legal thought.”); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 45 (1994) (“[W]riting is an integral part of thinking and cognitive development.”). Second, drafting is essentially entwined with legal research; the drafter creates with a legal theory in mind and ensures that the pleading sufficiently satisfies the elements of that theory. *See* MARILYN J. BERGER, JOHN B. MITCHELL & RONALD H. CLARK, *PRETRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY* 161 (2007) (labeling “strategic pleading” as a “goal-oriented approach”). Since legal research is a riskier endeavor, *see infra*, Part III.C.2.c, drafting shares some of the peril accompanying the delegation of research.

134. *See, e.g., In re Easler*, 272 S.E.2d 32, 32 (1980) (“legal research” permitted); Utah Ethics Op. No. 99-02, *supra* note 132 (stating that “[nonlawyers] may perform a wide array of services, including . . . conducting legal research”).

135. Some lawyers qualify as legal specialists, usually under a state-certification scheme. For a discussion of the specialization issue, *see* RHODE & LUBAN, *supra* note 5, at 682–87; *see also* *Peel v. Att’y Registration & Disciplinary Comm.*, 496 U.S. 91, 110–11 (1990) (holding that a lawyer had a First Amendment right to advertise as a specialist).

to her nonlawyer colleagues.¹³⁶ For fact investigation, the lawyer's confidence in the resulting product must necessarily be less than in either of the first two examples. While some of the nonlawyer's factual research may produce uncontrovertibly reliable results—a witness statement notarized by the witness, for instance, or a certified copy of a publicly recorded document¹³⁷—not all factual research permitted to be performed by nonlawyers would satisfy that description. The lawyer might reasonably rely, using her legal and professional judgment, on the reports of her investigators and other nonlawyer staff about events, accounts, observations, medical histories, and the like, when she develops her strategy and completes her final lawyering activity.¹³⁸

Like with each example discussed, the lawyer's performance herself of the tasks would decrease the risk of distortion or error or sloppiness, but her performance would increase, perhaps dramatically, the cost of her services. The lawyer, her clients, and the legal profession have opted to accept this minimal additional risk in return for the benefits of cost saving and efficiency. They do so, it is safe to assume, because the resulting risk from the delegation is extremely small due to the oversight and supervision of the experienced lawyer with judgment to guide her assessments.¹³⁹

136. See, e.g., *In re Easler*, 272 S.E.2d at 32; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 85 (1935). Indeed, some texts train nonlawyers how to engage in fact investigation. See, e.g., ELLEN J. WOLTER, *FACTFINDING ON A SHOESTRING FOR THE PARALEGAL: INEXPENSIVE TECHNIQUES FOR GATHERING INFORMATION* (1996).

137. Even in these most safe examples, the lawyer's delegation of a task to a nonlawyer involves an added element of risk, since the lawyer has not obtained the resulting papers herself. The nonlawyer may have forged the witness document, or the witness may not be who he claims to be. Such risks are extremely unlikely, of course, but nevertheless represent an inevitable element of delegation, and that, indeed, is the point of this entire discussion.

138. A lawyer who understands that she has authority to assign, say, a document-preparation task to a nonlawyer must nevertheless exercise judgment and discretion about what documents to assign the nonlawyer to prepare, given the importance, complexity, and subtlety of the document and the skill and experience of the nonlawyer. So, for example, a lawyer may ask an experienced real estate paralegal to prepare a HUD-1 settlement statement as part of an uncomplicated residential real estate closing, understanding that the experienced paralegal is very likely to fill the form out correctly. See, e.g., Comms. of the Fla. Bar, *Annual Reports*, Fla. B.J., June 2006, at 30, 58 (“[M]any real estate practitioners rely on paralegals and computer software to complete certain real estate documents and settlement statements.”). The same lawyer ought not, and would not, ask a volunteer college-student intern to draft a Petition for a Writ of Certiorari to the United States Supreme Court on a deeply complicated antitrust dispute. The concept of “document preparation,” therefore, does not offer any helpful answer to the question about the propriety of assignment of tasks to a nonlawyer. The only true consideration is an assessment of the risks and benefits to the client of the assignment and the combined likelihood of the nonlawyer being wrong and the case or matter suffering as a result.

139. Note that this understanding of the use of nonlawyers as a risk-management device is not only applicable to the lawyer's delegation choices. The same kind of risk/benefit assessment occurs on a daily basis within the lawyer's own work and her own practice. Even without using assistants, at some point in her work, the lawyer finds herself satisfied that she has completed enough factual and legal research, enough redrafting of documents, and enough consulting with experts, to proceed to a final product for her client. She always could spend more time at greater cost to the client, but she exercises her judgments about when to stop. That same set of heuristics operates in her assessment of the reliability of her assistants' contributions.

In each of the examples described (drafting, legal research, and fact investigation), the nonlawyer's work *could possibly be wrong*. The nonlawyer's drafting of a motion might omit a critical element of the motion's argument, leaving it fatally flawed.¹⁴⁰ The nonlawyer's legal research could overlook a critical new development eviscerating the strength of the authorities located and reported to the lawyer. The nonlawyer's factual research might be sloppy, incomplete, or distorted for any number of reasons.¹⁴¹ Of course, a lawyer's performance of any of those very same tasks *could also be wrong*, although the odds of that happening are seemingly lower than in the case of the nonlawyer's work, especially if we accept (as we do for the sake of this Article) the premises of the unauthorized-practice dogma.¹⁴² The lawyer's supervision of the nonlawyer's work decreases the risk of error, but it cannot eliminate it.

Clients, though, should, and in fact do, accept the just-described use of nonlawyers as a reasonable trade-off that will reduce the cost of legal services with minimal effect on the quality of the services rendered. In assessing the wisdom of a lawyer's use of nonlawyer services to assist in her work for clients, that matrix is the ultimate standard by which the profession ought to evaluate this scheme: Is a client sufficiently protected by the lawyer's delegation of some tasks to others? Put another way, should the profession permit a client to elect to retain a lawyer who will delegate some of her tasks to supervised nonlawyers? So long as the lawyer, exercising her judgment about the complicated practice world in which she operates and accepting the ultimate responsibility for the results of the risks involved, concludes that the work performed by the nonlawyer is reasonably close to what the lawyer would achieve at a significantly higher cost to the client, then the profession ought to permit an informed client to accept those minimal risks. It is, in other words, a sensible thing for the profession to allow and for an informed and understanding client to choose.¹⁴³

140. It is a tricky analytical question—but perhaps an irrelevant one for our purposes—whether the faulty motion ought to be considered a *drafting* error or a *legal research* error. We noted above that the lawyer reviewing the final product of the motion should recognize drafting mistakes, but may not recognize research errors, if the reason for the research in the first place was the lawyer's need to learn some part of the law that she did not already know by rote memory.

141. The behavioral economists teach us that observations and understandings are seldom “objective” and value neutral. Individuals are subject to a wide range of biases and “cognitive illusions” that distort their perceptions. *See, e.g.,* ARIELY, *supra* note 108; MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* (6th ed. 2006). Because lawyers are equally subject to the same cognitive processes and biases, it is an intriguing question whether a lawyer would be more or less capable of approaching an “objective,” undistorted understanding of factual issues compared to a lawyer's assistant. *See, e.g.,* Linda Babcock, Henry S. Farber, Cynthia Fobia & Eldar Shafir, *Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289, 293–94 (1995) (stating that negotiators reach very different assessments about the value of a case when given identical information); Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 L. & SOC. INQUIRY 913 (1997) (showing plausible debiasing efforts).

142. *See supra* text accompanying notes 4–9.

143. Note here an apparent underlying construct—that a client could choose, and a lawyer seemingly would be bound by that choice, to pay a lawyer her higher billing rate to perform all of the tasks the lawyer might otherwise delegate to a nonlawyer. This construct treats the use of

d. Legal Advising and Counseling—A Categorical Exclusion?

We now reach our fourth example, that of providing legal advice to a client, the assignment most frequently identified by the advisory authorities as nondelegable.¹⁴⁴ If the advisory authorities' description of the lawyer's duties is accurate, and if we accept a literal and not a nuanced interpretation of that description, then lawyers possess no discretion to delegate to a nonlawyer the task of providing to a client some legal advice, while possessing lawful discretion to delegate to the nonlawyer the responsibilities of drafting documents, performing legal research, and conducting fact investigation. We saw above that the literal reading of that prohibition was not supported by any fair interpretation of available substantive law.¹⁴⁵ We see here why such a literal reading would be incoherent. Applying the same matrix of risk management, informed consent, and unauthorized-practice prophylaxis, we see lawyers must possess the same discretion to delegate to a supervised nonlawyer the assignment of providing some legal advice.

Lawyers who assign document-preparation, legal-research, and fact-investigation tasks to nonlawyers risk malpractice liability or other adverse consequences if the nonlawyers perform the tasks incompetently.¹⁴⁶ Because any performer of legal services, lawyer or nonlawyer, risks committing malpractice if her work happens to be sloppy or in error, the question for the lawyer remains one of assessing the acceptable level of risk, and accepting responsibility to indemnify the harmed client if errors occur and result in malpractice damages.¹⁴⁷

The difficulty with applying a *categorical* test that would bar lawyers from delegating to a nonlawyer discrete lawyering activities like "counseling" is apparent. The underlying justifications for use of nonlawyers as part of an efficient, client-

a nonlawyer assistant as a lawyering option for which the client must provide informed consent. While that construct makes powerful sense conceptually, *see, e.g.*, BINDER ET AL., *supra* note 104, at 296 (describing an orientation in which most substantive decisions remain for the client to decide), it does not appear in the literature addressing the professional ethics of legal assistants or of lawyers using legal assistants, *see, e.g.*, MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. (2004) (giving no suggestion of informed consent to use of nonlawyer); MODEL RULES OF PROF'L CONDUCT R. 5.3 (2009).

144. *See, e.g.*, Doe v. Condon, 532 S.E.2d 879, 883 (S.C. 2000) ("[A]nswering legal questions would constitute the unauthorized practice of law."); NALA CODE OF ETHICS, *supra* note 11, at Canon 3 ("A paralegal must not . . . give legal opinions or advice."); S.C. Bar Ethics Adv. Comm., Op. 02-12 (2002) (stating that it is "well settled that a paralegal may not give legal advice"); CONN. BAR GUIDELINES, *supra* note 132 (stating that "legal advice may not be given" during client interviews); *cf.* MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. Guideline 3(C) (2004) (stating that a nonlawyer must not accept "responsibility for a legal opinion rendered to a client").

145. *See supra* notes 40–97 and accompanying text.

146. *See, e.g.*, VLT, Inc. v. Lucent Techs., Inc., 54 Fed. R. Serv. 3d (West) 1319 (D. Mass. 2003) (paralegal's mistake waives privilege); Amgen, Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287 (D. Mass. 2000) (same); Christine Beck Lissitzyn, *What's in a Name? Should Paralegals Be Liable for Legal Malpractice?*, 77 CONN. B.J. 86 (2003), *reprinted in* PROF. LAW., March 2005, at 2, 12–14 (2005) (describing when the lawyer, and when the nonlawyer, would be liable for malpractice damages to an injured client).

147. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (2002); Lissitzyn, *supra* note 146, at 97; WOLFRAM, *supra* note 4, at 206–26.

centered law practice apply equally as well to some forms of counseling as they do to some forms of document preparation, legal research, or fact development. To understand why, we return to the concept of *supervision*. All nonlawyer work must be properly supervised, whatever its nature.¹⁴⁸ The critical question is what constitutes effective supervision.¹⁴⁹

As noted above,¹⁵⁰ supervision of a subordinate, whether a lawyer or a nonlawyer, does not mean that the supervising lawyer must observe every action the supervisee takes.¹⁵¹ It does not mean that the supervising lawyer must reprise the work performed by the supervisee to ensure its accuracy.¹⁵² Instead, a practical understanding of supervision shows it to consist of measures by the lawyer which offer assurance that the delegated work will be performed competently.¹⁵³ It is a risk-management concept—it cannot guarantee competent service any more than the lawyer’s doing the work herself could guarantee that result.¹⁵⁴

A lawyer may delegate to a nonlawyer the responsibility to communicate legal advice to a client in the same manner, and employing the same risk-management and supervision skills, as the lawyer would delegate a legal research or document-drafting task. A lawyer who knows that her nonlawyer colleague—assume, for the moment, an experienced lateral who is not a member of the bar and is not practicing “temporarily” in the state¹⁵⁵—understands a client’s legal issues with depth and sophistication and

148. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 (2002).

149. Supervision is central to the role of clinical legal education and has received much attention in that realm. *See, e.g.*, Gerald J. Clark, *Supervising Judicial Interns: A Primer*, 36 SUFFOLK U. L. REV. 681 (2003); Gundlach, *supra* note 17; Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401, 414 (2000); William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 477–81 (1995).

150. *See supra* text accompanying note 129–30.

151. The cases where a court determines that delegation was proper tend to involve fee disputes, where the quality of the lawyering product tends not to be an issue. *See, e.g.*, *Missouri v. Jenkins*, 491 U.S. 274, 286–89 (1989) (describing an unsuccessful challenge to compensation for paralegals); *In re Jastrem*, 224 B.R. 125, 131 (Bankr. E.D. Cal. 1998) (finding the paralegal fees appropriate); *see also In re Opinion No. 24 of the Comm. on the Unauthorized Practice of Law*, 607 A.2d 962, 966 (N.J. 1992) (acknowledging the many proper tasks for nonlawyer assistance to lawyers).

152. *In re Opinion No. 24*, 607 A.2d, at 969 (affirming practice of using “independent paralegals” not employed by a law firm); MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. Guideline 2 cmt. (2004) (stating that a lawyer must provide adequate instruction and monitor progress).

153. *See* RESTATEMENT (THIRD) OF AGENCY § 7.05(1) cmt. d (2006). A principal is liable if an agent is not adequately supervised. *Id.* Supervision includes “reasonable mechanisms to assure compliance with instructions.” *Id.*

154. I use the term “guarantee” to mean that the lawyer can be absolutely certain that no mistakes will be made. If we understood “guarantee” to mean an indemnification or compensation if the resulting work is not competent, then in both scenarios the lawyer would “guarantee” the result.

155. *See* MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(1) cmts. 6, 8 (2009) (permitting an out-of-state lawyer to practice in the jurisdiction temporarily if associated with a lawyer who is licensed).

can discuss those issues with clarity and nuance can, consistent with the lawyer's fiduciary duties to her client, suggest that the nonlawyer meet with the client and advise the client about his rights. That delegation would be an essential part of the lawyer's representation of the client, for which the lawyer would remain ultimately responsible. The client would understand that the advice has been communicated by a nonlawyer and by implication (or perhaps expressly so) would consent to the use of a less-expensive device to further the client's case.¹⁵⁶ No worry about unauthorized practice of law arises, both because the client is the beneficiary of the purported special skill of the lawyer¹⁵⁷ and because the nonlawyer presents no threat to the lawyer's livelihood, since the lawyer has full control over the use of that practice option.¹⁵⁸

Recall that a nuanced reading of the apparent categorical ban on nonlawyers offering legal advice supports this conclusion.¹⁵⁹ The authorities which repeat that generalized prohibition often qualify it with some version of the "conduit" notion,¹⁶⁰ approving a nonlawyer's communication to the client of the lawyer's ideas.¹⁶¹ It is critical, however, not to read the conduit conception in too crabbed and narrow a fashion. The narrow conduit version would approve a nonlawyer's providing legal advice only as a script reader, one who has heard the lawyer's legal conclusions and transmits those ideas to the client by rote. By that understanding, a reasonably talented high-school intern could accomplish that task.

A more sensible, and in fact the only sensible, understanding of the conduit idea goes much farther than the script-reading function. The better understanding approves of the nonlawyer's engaging the client in a spirited dialogue about the client's legal rights and duties, so long as the lawyer is confident that the nonlawyer may perform that task competently and effectively.¹⁶² The assistant still serves as a "conduit" for the lawyer's judgment and for the lawyer's skill at reading complexity and nuance. Because the lawyer is certain that the nonlawyer has the ability to manage the interaction, that judgment (and that risk assessment) controls. The lawyer is using the nonlawyer as one useful component of her lawyering "toolkit."¹⁶³

156. See *supra* text accompanying notes 109–13 (discussing the informed consent component of the conceptual framework).

157. See CRYSTAL, *supra* note 96, at 480 (noting the professed underpinning of unauthorized-practice rules as protecting clients by assuring the presence of a lawyer).

158. See RHODE, *supra* note 3, at 83 (noting the importance of that threat to the unauthorized-practice dogma).

159. See *supra* text accompanying notes 40–95.

160. See *HPD Labs., Inc. v. Clorox Co.*, 202 F.R.D. 410, 415 (D.N.J. 2001) (approving the conduit metaphor); *John Labatt Ltd. v. Molson Breweries*, 898 F. Supp. 471, 477 (E.D. Mich. 1995) (same); *Fl. Bar v. Beach*, 675 So. 2d 106, 109 (Fla. 1996) (finding that a nonlawyer acted as a "conduit" for the lawyer, without supervision, and suspending the lawyer).

161. See, e.g., N.H. SUP. CT. R. 35 ("[W]ith adequate lawyer supervision the legal assistant may provide information concerning legal matters."); MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. Guideline 2 cmt. (2004).

162. See Chavkin, *supra* note 18, at 1512. While Chavkin applies his arguments to students who are provisionally licensed to practice law under a state's student practice rule, his insights have relevance to nonlawyers to whom lawyers delegate tasks as part of the lawyers' practice. See Bryant & Milstein, *supra* note 107, at 208–09 (noting the importance of students' abilities to exercise judgment amidst uncertainty).

163. Cf. Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign*

This richer conduit conception, however, suggests some possible limits. Its trusting of the lawyer's assessment about the nonlawyer's skill might imply more liberty on the part of the lawyer than even an expansive reading of the unauthorized-practice-of-law dogma would tolerate. For instance, a lawyer might *accurately* trust her nonlawyer colleague's abilities so much (imagine, again, an experienced lateral associate) that the lawyer would confidently choose to assign the nonlawyer to handle a client's matter from beginning to end without any oversight by the lawyer at all—indeed, the lawyer may never even know of the client's existence, except perhaps to approve formally the creation of an attorney-client relationship with the law firm.¹⁶⁴ By all of the criteria we have employed above—the risk-management responsibilities of the lawyer, the informed consent of the client (who, we may assume, has assented to the nonlawyer's role), and the unauthorized-practice prophylaxis—that arrangement should pass muster. Given the lawyer's ultimate responsibility and her judgment about the depth and breadth of the nonlawyer's talent, there is no *conceptual* difference between that delegation and the lawyer's assigning the nonlawyer to draft a pleading. Nevertheless, despite the logic of this proposition, a lawyer using her nonlawyer assistant in this way proceeds at her own peril.¹⁶⁵ The critical problem with this setting is that the lawyer has not supervised the matters on which the nonlawyer has worked. Mere confidence in the talents of the nonlawyer would not suffice; the lawyer must oversee the actual work of the nonlawyer.¹⁶⁶

Law: The Lessons of History, 95 CAL. L. REV. 1335, 1347–48 (2007) (“[F]oreign and international law” serve as “part of the lawyer’s toolkit.”); David McGowan, *Politics, Office Politics, and Legal Ethics: A Case Study in the Strategy of Judgment*, 20 GEO. J. LEGAL ETHICS 1057, 1093 (2007) (“[R]ational actor game-theoretic analysis . . . is fundamental to a lawyer’s analytical toolkit.”).

164. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 (2002); *supra* text accompanying notes 109–17 (discussing this concept).

165. *Cf.* State v. Foster, 674 So. 2d 747, 754 (Fla. Dist. Ct. App. 1996). In *Foster*, an independent paralegal conducted depositions without the supervision from or association with an attorney. In affirming a finding of unauthorized practice of law, the court held “that the non-lawyer appellees’ active participation in questioning witnesses in depositions, without the presence and immediate guidance and supervision of a licensed practitioner . . . constitutes the unauthorized practice of law.” *Id.* at 753. In response to a motion to clarify its opinion, the court amended the preceding language to bar deposition questioning by nonlawyers “*even under the immediate guidance and supervision of a licensed attorney.*” *Id.* at 754 (emphasis added).

That amended language in *Foster*, if it happened to constitute the substantive law in Florida (which it seemingly does not, as it was simply dictum in the matter before the court), would undercut the broad conduit concept developed in the text. Besides its status as dictum, though, the court’s proposition is of more limited value because of the close relationship between depositions and court testimony. This Article has acknowledged from the beginning that nonlawyers cannot participate in court proceedings. See *supra* text accompanying notes 26–27. A deposition is, in many substantive respects, a preliminary version of court testimony. See FED. R. CIV. P. 30, 32 (preserving objections during depositions); FED. R. EVID. 804(b)(1) (using depositions at trial); *cf.* MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 1 (2004) (including a deposition as a proceeding before a “tribunal” for purposes of the rule prohibiting false statements made to a tribunal).

166. *Cf.* AUTHORIZED PRACTICE COMM., N.C. STATE BAR, GUIDELINES FOR ATTORNEYS LICENSED IN OTHER JURISDICTIONS 1 (2003) (“‘Appropriate supervision’ means the necessary and adequate training, instruction, and oversight of the activities of an unlicensed attorney.”).

Thus, a categorical exclusion of “counseling” or “advice giving” from the activities permitted to be delegated to a nonlawyer would be hard to defend and difficult to apply. The only conceivable justification for categorical treatment of that activity would be a purely prophylactic one. A creator of guidelines governing nonlawyer practice supervised by a lawyer might claim that the risks of harm to a client are so great from a nonlawyer’s advice giving that even a wise and experienced lawyer ought never be permitted to delegate a counseling activity to a nonlawyer colleague, regardless of the comfort level of the lawyer with the nature of the task and the qualifications of the nonlawyer. That argument, though, is a remarkably weak one. Risk abounds in assigning any task to a nonlawyer, just as risks abound (albeit presumably lower ones overall) in the lawyer’s doing the work herself. Some advice-giving tasks will objectively carry far less risk than some legal-research tasks. The guideline creator’s prophylactic arguments would perhaps support a categorical ban on the use of legal assistants entirely, but not to carve out categorical distinctions within the panoply of activities that a lawyer engages in while representing a client.

Similar arguments would apply to any attempt at a categorical exclusion of “negotiation” from the acceptable roles of nonlawyers in law firms.¹⁶⁷ The concept of negotiation tends to refer to activity involving the resolution of differences through bargaining and compromise in an effort to come to a settlement of a dispute or to complete a transaction.¹⁶⁸ Assuming for the sake of this argument that negotiation can, if performed within a legal setting, represent the practice of law that nonlawyers may not pursue,¹⁶⁹ a lawyer may nevertheless delegate to a nonlawyer assistant certain parts of the negotiation process with proper supervision and with the lawyer’s acceptance of responsibility for the activity. Such delegation, of course, would include negotiation meetings occurring outside of the presence of the lawyer.¹⁷⁰

We might wonder whether negotiation ought to be seen as qualitatively different from any of the previous categories, especially negotiation outside of the lawyer’s observation. A critic might think of that process as too inevitably intertwined with legal

167. For authority barring nonlawyers from engaging in negotiation, see STATE BAR OF N.M., *supra* note 70, at R. 20-103; *supra* note 71.

168. See RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 1 (2002) (“Negotiation is an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate . . . in a way that will make them better off than they could be if they were to act alone.”).

169. It is readily apparent that other professionals besides lawyers engage in negotiation; nevertheless, negotiation can be considered the practice of law when performed for a legal purpose or as part of a lawyer’s representation of a client. See *In re Dwight*, 573 P.2d 481, 484 (Ariz. 1977) (holding that an attorney acting in his capacity as an investment advisor was subject to ethical rules governing attorneys) (“As long as a lawyer is engaged in the practice of law, he is bound by the ethical requirements of that profession, and he may not defend his actions by contending that he was engaged in some other kind of professional activity.”). If a lawyer performing tasks open to nonlawyers is deemed to be practicing law, then a nonlawyer working with the lawyer is likely bound by the same principle.

170. If the lawyer were present at the negotiating table while the nonlawyer communicated with the other party to the negotiation, it is hard to understand that setting as a delegation of duties to the nonlawyer at all. A more accurate description would be that the lawyer herself is doing the negotiation, since she is present to intervene if the process is not unfolding as she expected.

judgment and deliberation such that a lawyer ought never—categorically—assign a nonlawyer to perform that role. While that worry has some plausible merit, it cannot justify a categorical ban on such delegation as a matter of professional ethics. As with all of the previous topics, the assessment of the propriety of the assignment rests on the lawyer's practical wisdom about the effectiveness of the nonlawyer's communication and implementation of the lawyer's judgments. Without doubt, some complex negotiations will never properly be assigned to a nonlawyer. But other less complex bargaining events, such as telephone calls to communicate and defend an offer or demand whose terms are easily understood by both parties, might sensibly and properly be delegated to an assistant. The question will always remain one of the lawyer's exercise of her professional judgment given the risks and benefits involved, with her assurance of satisfactory supervision of the nonlawyer.

Any of the other categories where some authority has precluded assignments to a nonlawyer may be understood using the same analysis. For instance, a nonlawyer could not independently establish an attorney-client relationship with a client.¹⁷¹ Because only a lawyer may represent a client, only a lawyer may create the relationship. But a nonlawyer, as the lawyer's conduit, may communicate the lawyer's agreement to accept an individual or an entity as a client.¹⁷² Similarly, only the lawyer may decide to terminate the relationship, but no authority would claim that the lawyer may not delegate to a nonlawyer assistant the communication of the closing of a matter. That kind of assistance is regularly accepted within the profession.¹⁷³

Therefore, once we exclude the distinctive context of the court appearance and proceedings auxiliary to that setting, not one of the categorical limitations on nonlawyer practice appearing in the literature is either accurate or valid. The only *categorical* limitation on nonlawyer delegation is, essentially, the substantive law of malpractice.¹⁷⁴

171. Not surprisingly, much advisory authority notes that limitation. *See, e.g.*, MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVS. Guideline 3 cmt. (2004).

172. *Cf. DeVaux v. Am. Home Assurance Co.*, 444 N.E.2d 355, 359 (Mass. 1983) (stating that a secretary's actions created an attorney-client relationship by the client's reliance).

173. *See, e.g., In re Marino*, 229 N.E.2d 23 (N.Y. 1967) (holding that it is permissible for a nonlawyer to communicate to a prospective client the lawyer's decision to decline a matter). The decision to end the relationship may be a collaborative one, in which the lawyer relies upon the insights of her knowledgeable assistant, so long as the triggering decision is made by the lawyer.

174. There are two ways to understand this categorical limitation. Its most obvious meaning relates to baseline competence—that a lawyer must offer her client competent legal services, and if delegation to a nonlawyer fails that standard, then the lawyer may not delegate. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004). But malpractice is also a relative, community-based standard. A typical understanding of professional negligence in the legal profession is breach of "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." *Cook, Flanagan & Berst v. Clausing*, 438 P.2d 865, 867 (Wash. 1968). The phrase "this jurisdiction" means what it says—that the application of the standard of care depends on local practices. *See Kellos v. Sawilowsky*, 325 S.E.2d 757, 758 (Ga. 1985) (referring to Georgia lawyers, not lawyers nationally). Thus, if the practice standard in a jurisdiction includes acceptance of much delegation to nonlawyers (and, it is fair to speculate, most local practices fit that description), the malpractice standard identified in the text will take that into account.

IV. APPLYING THE CONCEPTUAL FRAMEWORK TO THE ELSI STAFF

In this Part, I apply the framework to the story of the CED Project within Essex Legal Services Institute (ELSI), the Massachusetts legal services office.¹⁷⁵ The ELSI CED Project included one Massachusetts lawyer, Joe Bartholomew, whose familiarity with community economic development law was limited; an out-of-state lawyer, Dara Coletta, who knew national community economic development law extremely well from her practice in California; two law students, David Dahlstrom, who was a certified law student licensed to practice under the Massachusetts student-practice rule, and Julie Lucia, who was not eligible to be certified under that rule; and a college intern, Mike Newman, a sophomore at Tufts University. A crude understanding of the nonlawyer practice guidelines would lead to the conclusion that any one of the unlicensed persons could assist Bartholomew in some preparatory tasks, subject of course to his supervision. A more contextual and refined understanding of the guidelines will permit Bartholomew to assign work in a more principled fashion. Let us review the opportunities available for each member of the team in light of the framework developed above.

A. Joe Bartholomew, the Lawyer

Bartholomew is a lawyer licensed in Massachusetts, so his is the easiest example. Bartholomew may provide all of the legal services to the client MCDC,¹⁷⁶ but he must be sure that he is competent to do so. As a long-time litigator, Bartholomew is not yet familiar with many of the laws, schemes, practices, and regulations surrounding affordable housing development and real estate closings. He may still represent MCDC, subject to his client's informed consent,¹⁷⁷ if he is capable of achieving the necessary competence through study¹⁷⁸ or "through the association of a lawyer of established competence in the field in question."¹⁷⁹

175. For the CED Project description, see *supra* Part I.

176. See *supra* text accompanying note 35.

177. A client should understand the competence level of his lawyer, and should provide informed consent if the lawyer's expertise is still developing. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. d (2002) (noting that a client might choose to hire a lawyer without expertise); Alexis Anderson, Arlene Kanter & Cindy Slane, *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 536 (2004) (discussing law student competence); Christopher Sabis & Daniel Webert, *Understanding the "Knowledge" Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 927 (2002) (noting the importance of a client's understanding of his lawyer's competence).

178. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2009) ("A lawyer can provide adequate representation in a wholly novel field through necessary study."). While the ELSI story takes place in Massachusetts, I will refer to the ABA Model Rules instead of the Massachusetts version of those rules in order to maintain consistency with the analyses from earlier parts of this Article. The Massachusetts rules would not differ in any substantive way from the Model Rules. Because ELSI does not charge its clients, Bartholomew does not confront the complicated question of whether he can charge his clients for the time he needs to achieve competence. See *In re Fordham*, 668 N.E.2d 816, 822 (Mass. 1996) (suspending an experienced lawyer who charged excessive fees while preparing a novel type of case); *Robert L. Wheeler, Inc. v. Scott*,

Bartholomew's role in the CED Project does raise two questions. First, may he obtain his competence by associating with Dara Coletta, the unlicensed lawyer from California who knows the community economic development law extremely well? And second, as a novice at the new transactional work of the CED project, might he nevertheless supervise nonlawyers and assign them tasks? The response to both questions is yes.

ABA Model Rule 1.1 permits Bartholomew to become competent "through necessary study . . . [and] through the association of a lawyer of established competence in the field in question."¹⁸⁰ His intention at ELSI is to become competent by associating with Coletta, the expert from California, and learning from her. If we assume for the moment that Coletta possesses the expertise to understand the federal affordable-housing schemes as they operate in Massachusetts,¹⁸¹ Bartholomew may use her as his source of education. If she is not qualified as a "lawyer" with whom Bartholomew has "associate[d]," she still qualifies as a resource for Bartholomew's "necessary study."

The fact that Bartholomew is a novice in the field of affordable housing and community economic development does not preclude him from using nonlawyers to assist him. As a licensed lawyer he may still supervise the nonlawyer assistants, subject to his overarching fiduciary duties and his strategic judgment about the case. This conclusion follows from the baseline unauthorized-practice dogma described and explored above.¹⁸² The dogma assumes a generalized level of competence as a result of a lawyer's passing the bar.¹⁸³ The dogma trusts lawyers in ways that it cannot trust

777 P.2d 394, 396 (Okla. 1989) (stating a lawyer cannot pass on learning costs to client).

179. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2009).

180. *Id.*

181. This is a necessary assumption for the proceeding analysis, and not an unreasonable one. Much funding for affordable housing is connected to federal statutory and financing schemes. See, e.g., SIMON, *supra* note 34, at 19–26; Julianne Kurdila & Elise Rindfleisch, *Funding Opportunities for Brownfield Redevelopment*, 34 B.C. ENVTL. AFF. L. REV. 479, 479–80 (2007); Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play?*, 36 URB. LAW. 475 (2004).

Coletta's expertise in an area exclusively governed by federal law would likely not permit her to establish an office in a state where she was not licensed, even if she only practiced her federal work. See *Kennedy v. Bar Ass'n of Montgomery County*, 561 A.2d 200, 208–10 (Md. 1989) (holding that a federally admitted lawyer may not establish a Maryland office to practice federal law); *Servidone Constr. Corp. v. St. Paul Fire & Marine Ins. Co.*, 911 F. Supp. 560, 565–72 (N.D.N.Y. 1995) (forbidding attorney admitted by federal court, but not by New York, from establishing a practice in those federal courts from a New York office, without associating New York counsel); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 675–76 (1995) (concluding that most authority would not permit an out-of-state lawyer to establish an office to practice solely federal law). Some authority, though, supports such a limited federal practice. See *Ex parte McCue*, 293 P. 47 (Cal. 1930) (attorney moved to California, established office for practice in the federal district court, no violation of prohibition on unauthorized practice); AUTHORIZED PRACTICE COMM., *supra* note 166, at 5 (providing that a lawyer not licensed in North Carolina may establish an office dedicated to federal practice, subject to disclosures to prospective clients).

182. See *supra* text accompanying notes 118–23.

183. See JAMES E. MOLITERNO, *ETHICS OF THE LAWYER'S WORK* 146 (2d ed. 2003); see also Jeffrey M. Duban, *The Bar Exam as a Test of Competence: The Idea Whose Time Never Came*,

nonlawyers, by virtue of their bar admission. Therefore, as a matter of substantive law, Bartholomew may work with his team of nonlawyers on the MCDC matter, subject to his professional judgment about the competence of his team to accomplish the work for which MCDC has retained ELSI. A significant factor in his achieving competence, of course, is the presence on the team of Dara Coletta.

B. Dara Coletta, the Out-of-State Lawyer

Coletta is a lawyer in California, but in Massachusetts she is a nonlawyer, because she has not yet taken the Massachusetts Bar Exam. She therefore cannot practice in Massachusetts.¹⁸⁴ She is not eligible to practice in her new state under the safe-harbor provision of Model Rule 5.5(c)(1), which permits out-of-state lawyers to “provide legal services on a temporary basis . . . that (1) are undertaken in association with a lawyer who is admitted in this jurisdiction and who actively participates in the matter,”¹⁸⁵ because under any reasonable interpretation of that provision, Coletta is not practicing “temporarily” in Massachusetts.¹⁸⁶ Any legal services she provides to ELSI clients, then, are as a nonlawyer under the supervision of Bartholomew.

63 N.Y. St. B.J., July/August 1991, at 34, 35 (1991) (“[T]he Bar Exam, as a test of ‘minimum competence,’ serves to ‘protect the public against unqualified lawyers and promote public confidence in the legal profession.’”).

184. MODEL RULES OF PROF’L CONDUCT R. 5.5 (2004). For a discussion of out-of-state lawyers and their practice opportunities, see Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Market*, 60 STAN. L. REV. 1689 (2008); Pamela A. McManus, *Have Law License; Will Travel*, 15 GEO. J. LEGAL ETHICS 527 (2002).

185. MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(1) (2004).

186. The term “temporary” receives no definition in the Model Rules, but comment 6 to Rule 5.5 implies a broad scope for the term:

There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Id. at R. 5.5 cmt. 6. Despite that broad reading, it seemingly cannot apply to a lawyer who has made a permanent career change to the new state, and whose work for her clients is permanent work for a stable, in-state law firm. The example from the comment, a “single lengthy negotiation,” supports that conclusion. The ABA’s Commission on Multijurisdictional Practice, which developed the language in Rule 5.5, interpreted the “temporary” qualifier not to apply to a lawyer like Coletta. See COMM’N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASSOC., CLIENT REPRESENTATION IN THE 21ST CENTURY 25 n.36 (2002), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf (“Rule 5.5(c) often will not apply to an extended residence in a law office in a jurisdiction in which those lawyers are not licensed, because the intended presence in the jurisdiction will not be ‘temporary.’”). For an overview of the multijurisdictional issues leading to the recent amendments to Rule 5.5, see 2 HAZARD & HODES, *supra* note 4, § 46.3; Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 686 (2002); Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331, 1339.

The framework developed above, including the refined understanding of the conduit conception, would lead to the conclusion that Bartholomew possesses the discretion to delegate to Coletta considerable latitude in performing many of the legal tasks necessary for MCDC's representation. Under that framework, Bartholomew will represent MCDC as effectively as he can with the resources available to him, and the most valuable resource in his "toolkit" would be Coletta. With Bartholomew exercising his judgment about her effectiveness and retaining responsibility for the final lawyering product, Coletta may interview constituents of MCDC or other persons with knowledge about the housing development; draft documents such as affordable housing covenants and deed restrictions,¹⁸⁷ deeds,¹⁸⁸ mortgages, and the like; and conduct legal research, both on the federal law about which she has expertise but also on state and local law implications.¹⁸⁹

Coletta may also meet with constituents of MCDC, who serve as the organizational client agents for the representation purposes,¹⁹⁰ and explain the law about the affordable housing projects and development. She may only do so, however, as a conduit of Bartholomew, as his agent communicating the legal conclusions he is satisfied are reliable. In the setting described here, where Bartholomew has developed his competence through Coletta's expertise,¹⁹¹ the role configurations are delicately arranged. Because we accept the unauthorized-practice dogma's assertion that Coletta may not practice law directly, Coletta cannot offer her own *independent* advice to the MCDC constituents. To do so would constitute commission of a crime in Massachusetts,¹⁹² as in every state.¹⁹³ But if we accept the refined conception of the conduit within the framework developed above, Coletta may provide that advice if Bartholomew employs her nonlawyer services as part of *his* representation of MCDC. If Bartholomew's representation is competent because of his team's collective work under his supervision, and if he assumes full responsibility and liability exposure for the representation, then Coletta's activities are proper.

187. For a discussion of deed restrictions to ensure the continuation of the affordable quality of the housing being developed, see SIMON, *supra* note 34, at 143–60 ("constrained property").

188. See *In re Easler*, 272 S.E.2d 32, 32–33 (S.C. 1980) (holding that the drafting of deeds by a nonlawyer is permissible with a lawyer's supervision).

189. We saw above that paralegals often conduct legal research, and the advisory authority uniformly supports that delegation. See *supra* text accompanying notes 40–97. If paralegals, most of whom have not attended law school, may perform legal research as part of a lawyer's work for a client, it is readily apparent that Coletta, an expert and experienced lawyer in community economic development, may engage in legal research about that topic in a new jurisdiction. See *Att'y Grievance Comm'n v. Hallmon*, 681 A.2d 510, 514 (Md. 1996) (noting the benefits of attorneys delegating supervised work to qualified nonlawyers).

190. See MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2004) (lawyer represents an organization through its duly authorized constituents). For a discussion of the occasional difficulties in discerning which constituents speak for the entity client, see MILTON C. REGAN, JR. & JEFFREY D. BAUMAN, *LEGAL ETHICS AND CORPORATE PRACTICE* 76–96 (2005); William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003).

191. See *supra* text accompanying notes 176–83.

192. MASS. ANN. LAWS ch. 221, § 46A (LexisNexis 1999) (prohibiting an "individual, other than a member, in good standing, of the bar of this commonwealth," from practicing law).

193. See *supra* notes 3–4 and accompanying text.

That same analysis would apply to Coletta's negotiation, for instance, with a lender about the terms of a federal loan package, even if Bartholomew is not present during the negotiation,¹⁹⁴ as long as the persons with whom she negotiates do not misunderstand her role or her status.¹⁹⁵ Her signature on documents could bind the law firm and thus the firm's client.¹⁹⁶ If certain documents require the signature of a lawyer, then of course Coletta could not sign those papers. And, while the example offered here is entirely transactional, if a dispute ended up in court, Coletta could not appear on behalf of MCDC in court absent pro hac vice permission from the court.¹⁹⁷

C. David Dahlstrom and Julie Lucia, the Two Law Students

Recall that Dahlstrom and Lucia are each law students working within the CED Project, but Dahlstrom is a certified law student under the state's student-practice rule,¹⁹⁸ while Lucia is not. Before we examine what Bartholomew might delegate to a law student as a generic matter, we need to understand the effect of Dahlstrom's certification. If Dahlstrom's status as a certified law student makes him effectively a lawyer, then he and Bartholomew are essentially to be treated the same, and Dahlstrom would in fact have more authority to practice law in Massachusetts than Coletta possesses.¹⁹⁹

In fact, in Massachusetts, like many other states,²⁰⁰ the student-practice rule has very unclear applicability to transactional practice, and by its literal terms has unclear

194. We saw above that supervision does not contemplate monitoring or constant observation, but instead envisions systems and other indicia offering the supervisor reasonable and reliable assurance that the work will be performed adequately. *See* RESTATEMENT (THIRD) OF AGENCY § 7.05(1) (2006) (stating a principal is liable if oversight systems not in place).

195. *See, e.g.,* Rodriguez v. Montalvo, 337 F. Supp. 2d 212, 218–19 (D. Mass. 2004) (finding that a paralegal's interaction with a client sufficient to trigger former client conflict of interest); DeVaux v. Am. Home Assurance Co., 444 N.E.2d 355, 359 (Mass. 1983) (stating that a secretary's actions may have created an attorney-client relationship by the client's reliance); *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1561 (1994).

196. RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. e (2006) (agents may bind principals).

197. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c (2002).

198. *See* MASS. SUP. JUD. CT. R. 3:03.

199. *See In re Hatcher*, 150 F.3d 631, 636 (7th Cir. 1998) (stating that a certified law student is equivalent to a lawyer for purposes of recusal statute); Connecticut Comm. on Prof'l Ethics, Informal Op. 97-10 (1997) (providing that a law clinic student is considered a lawyer for purposes of conflict-of-interest considerations); Joy, *supra* note 17, at 832 (“[A] student-lawyer should be treated as a lawyer for ethics purposes.”); Peter A. Joy & Robert B. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLIN. L. REV. 493, 510 (2002) (reviewing authority treating law students as lawyers).

200. *See, e.g.,* COLO. REV. STAT. ANN. § 12-5-116.1 (West 2003) (providing that a certified law student may “appear and participate in any civil proceeding”); N.Y. COMP. CODES R. & REGS. tit. 22, § 805.5 (2008) (referring to civil and criminal court proceedings); ARIZ. SUP. CT. R. 38(d) (providing that a certified law student “may appear in any court or before any administrative tribunal”); GA. SUP. CT. R. 91 (providing that a certified law student may “assist in proceedings”); KY. SUP. CT. R. 2.540 (providing that a certified law student may “appear in any proceeding in any court”). *But see* ILL. SUP. CT. R. 711(c)(1) (stating that a certified law

applicability to out-of-court legal work by a student representing a client in a litigation matter. The Massachusetts rule allows a law student working with a legal services organization, among other settings,²⁰¹ to “appear” in court in various contexts on behalf of indigent clients.²⁰² The rule is silent about the proper role of the law student on behalf of a client apart from the court appearance itself,²⁰³ and the rule says nothing at all about law students representing clients in matters which have no relationship to a court proceeding, like in transactional community economic-development matters.²⁰⁴

Given the narrow applicability of the student practice rule, Dahlstrom and Lucia are situated identically in their status within the ELSI CED Project. (In the litigation units of ELSI, of course, Dahlstrom would have the status of a licensed lawyer for his clients.) Dahlstrom and Lucia, while law students, have the same status as any paralegal in any law office. The “law clerk” status provides them no special rights or privileges by virtue of that station. In fact, Dahlstrom and Lucia have the same *conceptual* status as Mike Newman, the college sophomore who serves as a volunteer intern for ELSI.

D. Mike Newman, the College Sophomore Intern

Newman has volunteered at ELSI for this academic year. He is a sophomore at Tufts University, and he is nineteen years old. Unlike all of the other members of the CED Project team, he has no legal training. He is, however, a nonlawyer assistant, and Bartholomew possesses discretion to assign to him certain discrete tasks.

This array of third-year law student Dahlstrom, second-year law student Lucia, and college sophomore Newman presents to Bartholomew an opportunity to understand contextually his responsibilities as a supervising lawyer using nonlawyers within his toolkit. The best guidance that the profession and the substantive law can provide to Bartholomew is that he has discretion to assign to nonlawyers some of the units of work and activity that he would complete on his own if he had no assistance at all. That discretion is cabined in critical ways by Bartholomew’s judgments about effective risk management and maintenance of competent practice, as well as the extent of his client’s buy in. It is extremely unlikely that Bartholomew would assign to Newman the task of drafting an affordable housing covenant, the complex document that, when recorded, binds future purchasers of the affordable units to maintain the unit’s

student “may counsel with clients, negotiate in the settlement of claims, and engage in the preparation and drafting of legal instruments”).

201. Third-year students are within the rule’s ambit if they work for the Commonwealth of Massachusetts, a municipality, a public defender office, or a legal aid office. MASS. SUP. JUD. CT. R. 3:03(1). The rule applies to a second-year student who is enrolled in a law school clinical program. MASS. SUP. JUD. CT. R. 3:03(8).

202. MASS. SUP. JUD. CT. R. 3:03. Some settings, such as the state’s District Court and the Probate and Family Court, are covered automatically; other courts, such as the Superior Court and the courts of appeal, are open to student appearances at the discretion of the judge or justice hearing the matter. The rule also does not define indigence.

203. *See id.* By the clearest of implications, the rule authorizes students who may appear in court on behalf of an indigent client to engage in all aspects of the practice of law on behalf of that client outside of the courtroom.

204. Virtually all states’ student-practice rules share the narrow litigation focus found in the Massachusetts rule. *But see* TENN. SUP. CT. R. 7, § 10.03 (allowing law students to “provide legal services to . . . any person or entity financially unable to afford counsel”).

affordable character.²⁰⁵ It is difficult to conceive of that delegation qualifying as an exercise of wise judgment on Bartholomew's part, given Newman's lack of experience and legal training. Using the same metric, Bartholomew might ask Newman to locate the legal description of a property from the registry of deeds and then to create a first draft of a deed for that unit, using the previous deed as a template.²⁰⁶

Bartholomew might assign Dahlstrom, a third-year law student who is licensed to represent clients in complicated housing litigation,²⁰⁷ to work on the affordable-housing covenant that Bartholomew would not assign to Newman. Bartholomew might also assign Dahlstrom to offer advice to the clients, depending on his comfort level with Dahlstrom's mastery of the material and his judgments about his best representation of the client.²⁰⁸ Again, Dahlstrom would have lawful permission to

205. For a discussion of affordable housing covenants, see, e.g., CAL. HEALTH & SAFETY CODE § 33334.3(f)(7) (West 2008) (requiring that certain affordability covenants run with the land); Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35 (2007).

206. See *supra* note 188 (citing authority for deed drafting with supervision).

207. Students may represent tenants in contested trials in Massachusetts under the state's student-practice rule. See *Darmetko v. Boston Hous. Auth.*, 393 N.E.2d 395, 400 (Mass. 1979) (providing an example of student representation at an eviction trial). Students also conduct criminal trials while practicing under a student-practice rule. See, e.g., *Washington v. Moore*, 421 F.3d 660, 662–63 (8th Cir. 2005) (noting that a law student “put on the bulk of the defense” during jury trial); *State v. Glenn*, 935 P.2d 679, 680–81 (Wash. Ct. App. 1997) (noting an instance in which a student conducted trial).

208. Bartholomew has no obligation to offer to his clients the best services with the least risk exposure. That statement may seem striking, but it must be true or else the use of nonlawyers would disappear. It is true, by and large, that lawyers will be more competent than nonlawyers, and that nondelegation would imply less risk for the client than delegation. Lawyers frequently delegate, though, and delegation is an acceptable component of competent representation. For clients paying by the billable hour, the answer to the riddle may be quite simple—the client would choose to save valuable fees if the risk exposure is minimal. But nonlawyer practice also appears in settings in which the client is not paying by the hour, as in contingency fee contexts or in fee-for-service representation. See Ashby Jones, *More Law Firms Charge Fixed Fees for Routine Jobs*, WALL ST. J., May 2, 2007, at B1 (describing pressure from corporate clients to limit hourly fees). It simply must be true that lawyers have permission to develop a mix of resources that together achieve competent service, even if some other efforts might minimally increase, at great cost, the opportunity for benefit to the client. The standard of care for lawyers reflects common and ordinary practice, not the best practice possible. See 2 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 20.2, at 1306 (2009) (describing the standard of care for lawyers as relative to lawyers in similar circumstances); see also *Wooten v. Heisler*, 847 A.2d 1040, 1043 (Conn. App. Ct. 2004) (stating that malpractice is “the failure to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession”); *Wood v. McGrath, North, Mullin & Kratz, P.C.*, 589 N.W.2d 103, 108 (Neb. 1999) (stating the competence is determined by considering “whether the attorney exercised the same skill, knowledge, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of all other legal tasks”).

In the setting of free legal services, the clients have less autonomy regarding the allocation of the firm's resources because of the firm's fiduciary responsibility to spread its finite resources over many clients. I have examined that phenomenon in the past. See, e.g., Tremblay, *supra* note

counsel clients down the hall in ELSI's Housing Unit. Bartholomew could surely conclude that this talented law student has the capacity to advise the MCDC constituents about certain aspects of the law as it applies to the organization.

Julie Lucia, as a second-year student who is not a certified law student, falls somewhere in between Newman and Dahlstrom in her experience. Bartholomew will use her services in the same contextual way, discerning how she can assist in the endeavor in a responsible and competent way. She might, after all, show as much innate skill and talent as the third-year student Dahlstrom, and Bartholomew may use her in a much more elaborate way.²⁰⁹

CONCLUSION

Lawyers commonly associate with nonlawyers to assist them in their performance of lawyering tasks. A lawyer cannot know with confidence, though, whether the delegation of some tasks to a nonlawyer colleague might result in her assisting in the unauthorized practice of law, because the state of the law and the commentary about nonlawyer practice is so confused and incoherent. Some respected authority within the profession instructs the lawyer that she may only delegate preparatory matters and must prohibit the nonlawyer from either discussing legal matters with clients or negotiating on behalf of clients. Other authority suggests that the lawyer may delegate a wide array of tasks as long as the lawyer supervises the work of the nonlawyer and accepts responsibility for it. A good-faith lawyer reviewing the available commentary would find it difficult to achieve appropriate comfort with her delegation decisions. This uncertainty affects not only lawyers working with paralegals, but firms hiring out-of-state lateral associates and partners and law school clinical programs engaged in transactional work.

This Article has sought to articulate a framework for assessing delegation choices that is both coherent and sensible. It has shown that any delegation of work by a lawyer to a nonlawyer involves an exercise of the lawyer's judgment about an appropriate balance of risk and efficiency, along with an eye toward the client's informed choice about how to achieve the goals of the representation most efficiently. The prevailing unauthorized-practice-of-law dogma prevents a client from seeking economical representation by retaining only a nonlawyer, but that dogma trusts lawyers to protect a client's interests. With those considerations in place, this Article has concluded that the profession cannot, and in fact does not, deny the lawyer any categorical options in making delegation choices, except for those involving public court appearances. Aside from sending a nonlawyer to court, a lawyer may responsibly delegate any of her lawyering activities to a nonlawyer associate, subject to the prevailing conceptions of

32; Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 962–63 (1992); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1110–14 (1990).

209. Experienced clinical teachers report that second-year law students frequently demonstrate as much talent and effectiveness as student lawyers as third-year students, and sometimes more. For some empirical support for that sentiment, see Stefan H. Krieger, *The Effect of Clinical Education on Law Student Reasoning: An Empirical Study*, 35 WM. MITCHELL L. REV. 359, 366 (2008) (stating that there are only slight differences between second- and third-year students on certain empirical test measures).

competent representation and to the lawyer's retaining ultimate responsibility for the resulting work product and performance.

Some commentary and some court opinions suggest a different answer to the questions posed here, but those authorities do not withstand careful analysis. This Article has shown that a more careful reading of the commentary and the court dicta supports the framework and the thesis offered here. Nonlawyers may not independently engage in activity which equates to the practice of law, if by "independently" we mean without supervision and oversight from a lawyer. That important and uncontroversial limitation, however, along with the duty to provide competent representation, remain the only categorical restrictions on a lawyer's discretion. A supervised nonlawyer may play a much more active and important role in a lawyer's overall representation of her client than many have claimed. For the client, that is a very good result.

